Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

DENISE ARGUELLO and ALBERTO GOVEA,
Petitoners,

v.

CONOCO, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does 42 U.S.C. § 1981's protection against race discrimination in the making and enforcing of contracts prohibit racial harassment against customers when they are purchasing or attempting to purchase goods?

2. Is a person aggrieved by race discrimination in a place of public accommodation required to prove that future discrimination is likely to occur in order to have standing for injunctive relief under 42 U.S.C. § 2000a, *et seq.*, when § 2000a-3(a) provides that "the person aggrieved" by public accommodations discrimination on the basis of race may institute an action for temporary or permanent injunction?

LIST OF PARTIES AND RULE 29.6 LIST

The parties before the Court of Appeals and this Court are listed below. To Petitioners' knowledge, Conoco, Inc. has no parent companies or non-wholly owned subsidiaries.

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 29.6 LIST	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
A. Nature of the Case and Proceedings Below	3
B. Factual Background	4
1. The Incident	4
2. Arguello's Written Complaint and Conoco's Response	7
REASONS FOR GRANTING THE WRIT	8
A. The Fifth Circuit's § 1981 Ruling Conflicts with Plain Statutory Terms and Creates a Circuit Split Between the First, Fifth, and Sixth Circuits	9
1. The Fifth Circuit's Ruling is Contrary to § 1981(b)	9
2. Circuit Split Exists Between the First, Fifth, and Sixth Circuits	11
B. Unresolved Historic Civil Rights Questions Exist	13

TABLE OF CONTENTS—Continued

Page

C. The Fifth Circuit's § 2000a Ruling Conflicts with Plain Statutory Terms and Abolishes a Congressional Guarantee of Remedy for Race Discrimination in Places of Public Accommodation 17

1. Section 2000a-3(a) Allows Prior Discrimination Victims to Seek Injunctions Without Proving Future Discrimination ... 17

2. *City of Los Angeles v. Lyons* is Distinguishable and Should Not Apply to § 2000a Claims 19

CONCLUSION 21

APPENDICES 1a

TABLE OF AUTHORITIES

CASES — Page

Arguello, et al. v. Conoco, Inc., 207 F.3d 803 (5th Cir.), *cert. denied*, 531 U.S. 874 (2000) 3
Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954) 16
Christian v. Wal-Mart Stores, Inc., 252 F.3d 862 (6th Cir. 2001) 9, 11-12
City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 9, 17, 19-20
Garrett v. Tandy Corp., 295 F.3d 94 (1st Cir. 2002) 9, 11-12
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 16-17
Jones v. Alfred H. Mayer & Co., 392 U.S. 409 (1968) 22
Morris v. Dillard Dep't Stores, Inc., 277 F.3d 743 (5th Cir. 2001) 13
Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 18-19
Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 9
Plessy v. Ferguson, 163 U.S. 537 (1896) 14-15
Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) 10
Youngblood v. Hy-Vee Food Stores, Inc., 266 F.3d 851 (8th Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002) 13

STATUTES

28 U.S.C. § 1254(1) 2
42 U.S.C. § 1981 ..... *passim*
42 U.S.C. § 1981(a) 2, 9
42 U.S.C. § 1981(b) 2, 9-12
42 U.S.C. § 2000a, *et seq.* 2

TABLE OF AUTHORITIES—Continued

Page

42 U.S.C. § 2000a ..... *passim*
42 U.S.C. § 2000a(a) 2
42 U.S.C. § 2000a-2 ..... 2, 21
42 U.S.C. § 2000a-3(a) 3, 9, 13, 17-21

RULES

SUP. CT. R. 13.3 2
SUP. CT. R. 14.1(f) 3

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Denise Arguello and Alberto Govea pray for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on May 5, 2003.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 330 F.3d 355 (5th Cir. 2003), and a copy is contained in the Appendix attached hereto. *See* App. A. The Appendix also contains copies of pertinent opinions and judgments from the United States District Court for the Northern District of Texas. *See* App. B-F.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) to review a decision of the United States Court of Appeals for the Fifth Circuit by writ of certiorari after rendering judgment. The decision for which review is sought was entered on May 5, 2003. Arguello and Govea timely filed a Petition for Rehearing En Banc, which was denied on June 2, 2003. *See* App. G. Pursuant to SUP. CT. R. 13.3, this petition for writ of certiorari is timely because it is being filed within ninety days after the Fifth Circuit denied the Petition for Rehearing.

STATUTES INVOLVED

This case involves civil rights claims under the Civil Rights Act of 1866, 42 U.S.C. § 1981, and Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, *et seq*.

42 U.S.C. § 1981 prohibits race discrimination in the making and enforcing of contracts. It provides, *inter alia*, that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts ... as is enjoyed by white citizens," *see* 42 U.S.C. § 1981(a), and states that "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *See* 42 U.S.C. § 1981(b).

42 U.S.C. § 2000a prohibits race discrimination and other types of discrimination in places of public accommodation. Section 2000a(a) provides, *inter alia*, that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination on the ground of race," and § 2000a-2 states that "[n]o person shall withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive any person" of that

right. Section 2000a-3(a) provides that "[w]henever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a-2 ..., a civil action for preventive relief, including an application for a permanent or temporary injunction ... may be instituted by the person aggrieved."

The Appendix contains the full text of these statutes pursuant to SUP. CT. R. 14.1(f). *See* App. H-I.

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

This is a race discrimination case brought by a Hispanic daughter (Arguello) and father (Govea) who were discriminated against on the basis of their race on March 26, 1995 as they attempted to purchase and purchased some goods at a Conoco gas station in Fort Worth, Texas. Arguello and Govea brought claims under 42 U.S.C. §§ 1981 and 2000a.

The district court granted summary judgment against Arguello and Govea, and the Fifth Circuit reversed. *See Arguello, et al. v. Conoco, Inc.*, 207 F.3d 803, 812-13 (5th Cir.), *cert. denied*, 531 U.S. 874 (2000). After remand, a jury rendered a verdict in favor of Arguello and Govea on their § 1981 claims and awarded them $825,000. *See* App. K. Counsel then argued the § 2000a claims to the district court, which ruled that Arguello and Govea lacked standing for injunctive relief and denied their claims. *See* App. E-F.

The district court entered a Final Judgment awarding Arguello and Govea $825,000 under § 1981 and denying injunctive relief under § 2000a. *See* App. B. Then the district court granted judgment as a matter of law in Conoco's favor on the § 1981 claims, ruling that the race discrimination Arguello and Govea suffered was not actionable under § 1981. *See* App. C. Arguello and Govea appealed the district court's rulings on both their § 1981 and § 2000a

claims. A panel of the Fifth Circuit affirmed on May 5, 2003. *See* App. A. The Fifth Circuit denied Arguello's and Govea's Petition for Rehearing En Banc on June 2, 2003. *See* App. G.

B. Factual Background

On March 26, 1995, a Conoco store clerk subjected Arguello and Govea[1] to obscene racial abuse as they attempted to purchase and as Arguello did purchase some goods at a Conoco gas station in Fort Worth, Texas. Much of the incident was caught on videotape. *See* Plaintiffs' Exhibit 2.[2]

1. The Incident

On March 26, 1995, Arguello and Govea stopped at a Conoco store in Fort Worth, Texas to purchase gas and other items. They were traveling in two cars, on their way to a park for a family picnic. Arguello's mother (Govea's wife), Arguello's husband, and three of Arguello's children were also with them.

Cindy Smith was one of two Conoco cashiers on duty when they arrived.[3] After Arguello's husband pumped gas into her car, Arguello went inside the store to pay for the gas and to purchase some beer. Govea also entered the store to buy beer. Arguello and Govea stood in line, where Smith was waiting on other customers. When Arguello reached the counter, Arguello greeted Smith, but Smith just looked at her

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[1] Arguello is Govea's daughter. Arguello and Govea are Hispanic.

[2] By letter request dated August 15, 2003 to the Clerk of Court, counsel respectfully requested that the Court review and consider Plaintiff's Exhibit 2 when ruling on this petition. The videotape has no audio. The counter position for the tape is included herein when particular scenes are referenced.

[3] On at least ten occasions before March 26, 1995, minority customers had complained to Smith and asked if she was discriminating against them because of their race.

and ignored her. Smith's demeanor toward Arguello was different than it had been with previous customers.

When Arguello presented her credit card for payment, Smith immediately said, "I will need to see an ID." Arguello, an Oklahoma resident, then presented her valid Oklahoma driver's license. Smith refused to accept it and said, "I'm not going to take that." Arguello asked why. Smith said it was not valid. Arguello explained that it was, but Smith refused.

Govea has high blood pressure and takes medication to control it. During the dispute over Arguello's ID, Govea felt ill, felt his blood pressure rising, and believed he needed to get out of the store to avoid health problems. Govea told Arguello, "Let's just get out of here." He put the beer he had intended to buy on the counter and began walking out of the store.

Smith finally accepted Arguello's ID and credit card. When the receipt printed, Smith shoved the receipt towards Arguello to sign. Because of Smith's demeanor, Arguello told Smith that she did not have to take it out on her if she did not like her job. Smith said, "f—you, you f—ing Iranian Mexican bitch, whatever you are." Smith said this as she shoved the receipt at Arguello to sign and as Govea was walking away from the counter.[4]

After Smith said, "f—you, you f—ing Iranian Mexican bitch," Arguello signed the receipt and gave Smith a copy. Arguello began walking off but realized that she did not have an itemized receipt, so she walked back towards the counter. They eventually exchanged receipts. As Arguello turned away from the counter a second time, Smith, in a rage, shoved a six pack of beer off the counter towards Arguello. *See* Plfs' Ex. 2 (3:03:48).

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[4] Govea heard Smith say the word "bitch" to Arguello before he exited.

While Arguello was still inside, Govea began walking back towards the store because he was concerned for Arguello's safety. As Arguello walked out of the store, Smith stood by the window and made obscene gestures.[5]

Smith then used the store's intercom to broadcast: "Go back where you came from, you poor Mexicans" and called them "goat smelling Iranians." *See* Plfs' Ex. 2 (3:04:12-36).[6] Smith also taunted Arguello and Govea by blowing a kiss at them and waving. *See* Plfs' Ex. 2 (3:05:48). People in the parking lot, including Arguello's three young children, could hear Smith yelling over the intercom.

In light of Smith's behavior, Arguello and her family immediately tried to contact Smith's supervisor. They called Conoco from the payphone in the parking lot and left a message for Deanna Stavenhagen, the store manager, concerning what happened. Govea and Arguello's husband then walked toward the store to get Smith's name. Smith locked the doors, preventing them from entering. After Smith locked the door, Govea asked Smith if she was discriminating against them. Smith said, "yes, I am" and laughed. Smith allowed other customers in and out of the store while she kept Arguello and Govea locked out. *See* Plfs' Ex. 2 (3:13:10).

Because of Smith's conduct, Arguello and Govea were not able to purchase all of the items they intended to and tried to buy. Govea intended to purchase beer and stood in line to buy beer but could not because Smith's actions caused his blood pressure to go up, and he believed he had to remove himself from the store because of her behavior. When he tried walking back into the store the first time, Smith flipped

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[5] Arguello and Govea did not gesture in that manner towards Smith.

[6] Eddie Jordan, another customer who had been in line behind Govea, testified that Smith said something to the effect of "get your goat smelling ass out of here" and that it is possible Smith called Arguello and Govea "goat smelling Mexicans."

him off. When he tried the second time, Smith locked him out and told him she was discriminating against them. Govea would have purchased the beer he tried to buy but for Smith's conduct.

Smith's conduct also prevented Arguello from purchasing her father's beer, which she would have purchased but for Smith's discriminatory behavior. Arguello intended to leave the store with both her purchases and her father's purchases. When Govea started to exit the store, and before Smith told Arguello, "f—you, you f—ing Iranian Mexican bitch," Arguello slid Govea's beer next to the beer that she was buying. When Smith gave Arguello the credit card receipt to sign, Arguello assumed that she rang them both up, but Smith had not. Smith told Arguello, "f—you, you f—ing Iranian Mexican bitch" when she gave Arguello the receipt to sign, and Arguello did not want to have to go through another transaction because of the way Smith was treating her. If Smith had not told her, "f—you, you f—ing Iranian Mexican bitch," Arguello would have purchased Govea's beer.

2. Arguello's Written Complaint and Conoco's Response

Arguello called Smith's supervisor, Deanna Stavenhagen, and complained. Arguello did not feel that Stavenhagen was taking her seriously and asked for the name of the District Manager, Linda Corbin. Arguello called Corbin and told her she wanted to make a formal complaint.[7] Corbin told Arguello to contact Gloria Huff, a senior advisor of Human Resources. Arguello then sent a letter to Huff concerning the incident. *See* Plfs' Ex. 3, contained in App. J. In the letter, Arguello asked for a copy of Conoco's policy concerning

[7] Conoco received other customer complaints of race discrimination both before and after March 26, 1995. At least one complaint after that date involved the same store involved in this incident.

race discrimination against customers. Arguello never received any such policy, as Conoco does not have one.

Phyllis Williams, Conoco's Customer Service Representative, prepared a memo concerning the incident and Arguello's complaints. Even though Williams never viewed the videotape, never spoke to Smith, and never saw Smith's statement, Williams' memo concluded, "the incident [was] not what it appear[ed] to be" and Arguello "instigated the attack."

Smith was never reprimanded or disciplined.

Arguello never received any response from Corbin or Conoco about the incident. Govea later learned that Smith had been transferred to another store.[8] He went to that store to confirm Smith was still employed by Conoco. When he arrived, Smith saw Govea, gave him a big smile, and laughed.

The incident and Conoco's lack of response to it caused Arguello and Govea severe emotional distress, with continuing, present adverse effects.

REASONS FOR GRANTING THE WRIT

Compelling reasons exist for granting certiorari. First, a split exists among the circuit courts of appeal as to whether the store clerk's race discrimination against Arguello and Govea is actionable under § 1981. Moreover, the case involves extraordinarily important federal civil rights questions that have not been, but should be, settled by this Court, including whether racial harassment against consumers attempting to purchase goods is actionable under 42 U.S.C. § 1981 and whether persons who are "aggrieved by" (in the terms of the statute) race discrimination in a place of public accommodation have standing to seek injunctive relief under 42 U.S.C. § 2000a without meeting some special test absent in the statute. Because of its critical importance in enforcing

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[8] Corbin did not transfer Smith to discipline her.

public policy against racial discrimination in places of public accommodation, the Court should decide whether, as § 2000a-3(a) indicates, a victim of a prior act of race discrimination in a place of public accommodation has standing to seek injunctive relief or whether *City of Los Angeles v. Lyons*, a § 1983 case involving decidedly different public policy concerns, requires the aggrieved person to prove a likelihood of future discrimination.

A. The Fifth Circuit's § 1981 Ruling Conflicts with Plain Statutory Terms and Creates a Circuit Split Between the First, Fifth, and Sixth Circuits

The Fifth Circuit affirmed the district court's ruling that to prevail under § 1981, Arguello and Govea had to prove they were expressly prevented from making a purchase. *See* App. A and App. D. This ruling is contrary to the plain language of § 1981(b) and creates a conflict in the circuits. Specifically, the ruling conflicts with the First Circuit's opinion in *Garrett v. Tandy Corp.*, 295 F.3d 94 (2002) and the Sixth Circuit's opinion in *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862 (2001), both of which have ruled that § 1981 does not require a consumer to prove that the consumer was actually prevented from making a purchase.

1. The Fifth Circuit's Ruling is Contrary to § 1981(b)

Section 1981(a), originally derived from the Civil Rights Act of 1866, guarantees that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." In 1991, partly in response to this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), Congress amended § 1981 in the Civil Rights Act of 1991 by adding § 1981(b), which states that the phrase "'make and enforce contracts' includes the making,

performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." The purpose of the 1991 amendment was "expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 308 (1994). The addition of § 1981(b) in the 1991 amendments increased liability and established new standards of conduct under § 1981. *Id.* at 304. Because of the 1991 amendments, § 1981 now applies to "all phases and incidents of the contractual relationship." *Id.* at 302.

According to § 1981(b)'s plain language, § 1981 protects customers not only from race discrimination that expressly prevents them from making a purchase but also from all race discrimination that deprives them of the same "benefits, privileges, terms, and conditions of the contractual relationship" as those given to white customers. The Fifth Circuit's ruling too narrowly defines "making a contract" under § 1981. The Fifth Circuit imposes a nanosecond definition—a consumer contract is "made," from start to finish, and the contractual relationship between consumer and merchant exists only during the moment when the goods and payment are simultaneously exchanged. *See* App. A, p. 8a-9a and n.8.

Conoco's racial abuse of Arguello and Govea during their attempts to purchase goods deprived them of the same benefits, privileges, terms, and conditions of the contractual relationship provided to white customers. *See* § 1981(b). Purchasing goods at a convenience store is not a nanosecond process where the customer instantly appears before a clerk, makes a purchase and disappears. Section 1981 must protect for more than a nanosecond. Shopping involves walking in, looking for and selecting items to buy, standing in line with the items, conversing with the clerk, making payment, walking out, and having the option of going back in. Unlike Arguello and Govea, Conoco's white customers did not have

to attempt to make their purchase while being profanely racially abused. White customers did not have to dodge products thrown at them. White customers did not have to leave the store with their purchases incomplete. White customers were not taunted. White customers were not locked out of the store and told to their faces they were being discriminated against. Contrary to the Fifth Circuit's ruling, the plain terms of § 1981(b) say that the race discrimination Arguello and Govea suffered is actionable under § 1981.

2. Circuit Split Exists Between the First, Fifth, and Sixth Circuits

Certiorari should also be granted on the first question because a circuit split exists on the issue. The First and Sixth Circuits hold that racial harassment against a consumer during the sales process is actionable under § 1981. In contrast, in this case, the Fifth Circuit holds that completing a consumer purchase negates a § 1981 claim and that racial harassment is not actionable unless the customer is expressly prevented from making a purchase.

Both the First and Sixth Circuits have held that § 1981 in a commercial context does not require proof that the customer was prevented from making a purchase. *See Garrett v. Tandy Corp.*, 295 F.3d 94, 100-102 (1st Cir. 2002); *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 872-73 (6th Cir. 2001). In *Christian*, the Sixth Circuit held that in a § 1981 commercial establishment case, a plaintiff must prove (1) plaintiff is a member of a protected class, (2) plaintiff sought to make or enforce a contract for services ordinarily provided by the defendant, and (3) plaintiff was denied the right to enter into or enjoy the benefits or privileges of the contractual relationship in that (a) plaintiff was deprived of services while similarly situated persons outside the protected class were not and/or (b) plaintiff received services in a markedly hostile manner and in a manner which a reasonable person would

find objectively discriminatory. *Christian*, 252 F.3d at 872. The Sixth Circuit made clear that this does *not* require an outright refusal of service. *Id.* at 873. Under the Sixth Circuit's rule, the jury verdict in favor of Arguello and Govea would not have been vacated, because substantial evidence showed that both Arguello and Govea received services in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory. *See id.* at 872.

Similarly, in *Garrett v. Tandy Corp.*, the First Circuit made clear that § 1981 does not require an outright refusal of service and suggested that racial harassment of a customer could be sufficient to state a claim under § 1981. After noting the 1991 amendment to § 1981 (see § 1981(b)), the court stated:

> The 1991 expansion of the definition of "make and enforce contracts" in section 1981, then, extends the reach of the statute to situations beyond the four corners of a particular contract; the extension applies to those situations in which a merchant, acting out of racial animus, impedes a customer's ability to enter into, or enjoy the benefits of, a contractual relationship.

Garrett, 295 F.3d at 100, citing *Christian*, 252 F.3d at 872. *Garrett* suggested that racial harassment on the store premises would be enough to state a claim, as it affirmed dismissal of the customer's claim in part because the situation did not involve harassment while on the store premises. *Id.* at 101-02.

In contrast to these cases, the Fifth Circuit has limited the scope of § 1981's protections against race discrimination in the consumer context to situations where the consumer is expressly prevented from making a purchase. Although the court stated that a § 1981 claim exists "where a customer has engaged in an actual attempt to contract that was thwarted in

some way by the merchant,"[9] *see* App. A, p. 5a-6a, the court affirmed the district court's reversal of the jury verdict on the grounds that neither Arguello nor Govea could show that they were *prevented* from making a purchase. *See* App. A, p. 6a-7a and n.6 (stating that"no reasonable jury could conclude that Smith prevented Govea from making a purchase" and that Arguello's claim failed "because she successfully completed the transaction").[10]

Certiorari is appropriate on Question 1 because the circuit courts are split on this important civil rights question that this Court has not yet addressed. The Court should grant certiorari to settle this conflict and to define the scope of § 1981's protections where a person is purchasing or attempting to purchase goods.

B. Unresolved Historic Civil Rights Questions Exist

Certiorari is appropriate on both Questions 1 and 2 because the case involves extraordinarily important federal civil rights questions that have not been, but should be, decided by this Court, including whether racial harassment against consumers attempting to purchase goods is actionable under § 1981 and whether persons who are aggrieved by race discrimination in a place of public accommodation can seek an injunction as § 2000a-3(a) says they can.

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[9] *See also Morris v. Dillard Dep't Stores, Inc.*, 277 F.3d 743, 751 (5th Cir. 2001), which the Fifth Circuit quotes in Arguello.

[10] Arguello did not, in fact, purchase all of the goods she intended to buy and therefore did not "successfully complete" her transaction. The Fifth Circuit's ruling that no liability under § 1981 exists if the transaction is completed is similar to the Eighth Circuit's ruling in *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851 (2001), *cert. denied*, 535 U.S. 1017 (2002) (stating that neither party owed the other any contractual duties once the customer paid for and received the goods). As previously discussed, these decisions conflict with the rulings of the First Circuit in Garrett and the Sixth Circuit in Christian.

As our nation has evolved, so too have our civil rights laws forbidding race discrimination. Since the passage and ratification of the Thirteenth Amendment, this Court has examined race discrimination in a number of contexts, *e.g.* in rail cars, in schools, in places of employment, in voting booths, and in various places of public accommodation.

This case asks the Court to again define the scope of laws effectuating the Thirteenth Amendment. Specifically, do minority customers who are racially harassed and discriminated against on the basis of their race while attempting to purchase goods at a place of public accommodation have any protection under 42 U.S.C. §§ 1981, 2000a, or both?

Despite certain and outrageous race discrimination at a place of public accommodation and a jury verdict and an $825,000 jury award in their favor, the Fifth Circuit and the district court ruled that Arguello and Govea have no remedy under either § 1981 or § 2000a. Those courts concluded that the abusive racial harassment Arguello and Govea suffered while attempting to purchase goods is not actionable under § 1981 and that they lacked standing to seek injunctive relief under § 2000a because they could not prove the likelihood of future discrimination.

The Fifth Circuit's ruling ignores the plain statutory language of both §§ 1981 and 2000a and severely undermines public policies against race discrimination. By focusing not on the treatment Arguello and Govea were subjected to and instead focusing solely on whether or not they were expressly prevented from buying goods, the Fifth Circuit's ruling resurrects the spirit of *Plessy v. Ferguson*, 163 U.S. 537 (1896) and turns back the clock to a time when minority customers could buy the same goods whites could buy but had to stand in line at the back door to do it.

Under the Fifth Circuit's ruling, taunting and racial abuse of minority customers is legal, and the victims have abso-

lutely no remedy. Literally, under the Fifth Circuit's ruling, companies can freely permit and even instruct clerks to call minority customers racial slurs while selling them goods, and no liability attaches even if the company tells clerks to simultaneously treat white customers with dignity and respect. These are the badges and incidents of slavery that the Thirteenth Amendment, § 1981 and § 2000a were designed to abolish. *See Plessy*, 163 U.S. at 555 (Harlan, J., dissenting) (noting that the Thirteenth Amendment was aimed not only at striking down slavery but also at "prevent[ing] the imposition of any burdens or disabilities that constitute badges of slavery or servitude").

Without any exaggeration, the ruling would allow companies to lawfully post this NOTICE:

> **FEDERAL COURT APPROVED:**
>
> We will sell to you if you insist, but **THIS IS THE SOUTH.**
>
> **WE INSULT AND ABUSE MEXICANS AND NIGGERS.**[11]
>
> **WHITES PREFERRED.**

The Court should grant certiorari on Questions 1 and 2 because both involve important questions of federal law that have not been, but should be, decided by this Court. Because of the Fifth Circuit's narrow and untenable reading of two of the nation's most important civil rights laws, certiorari is necessary to demonstrate that laws prohibiting race discrimination are more than mere paper guarantees. Minority

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[11] Although Conoco never apologized for Smith's language, Petitioners apologize for subjecting the Court to this outrageous language. We must be explicit. What is at stake in this petition is whether Hispanics, African Americans and other minorities in this country must submit to such language as a condition of shopping at convenience stores. Now is the time to fully expose the issue on which we seek this Court's guidance.

customers' right to participate in the marketplace on equal footing as white customers involves more than simply allowing them to buy the same goods. Racially abusing and humiliating minority customers who are attempting to buy goods is an affront to their civil rights akin to requiring minority children to attend separate schools. The racial abuse the Fifth Circuit legalizes is indistinguishable from requiring Rosa Parks to sit at the back of the bus. Under the Fifth Circuit's reasoning, it would be lawful for teachers and other school officials to throw items at and use racial slurs against the *Brown* plaintiffs[12] during their classes at integrated schools, even if those teachers and school officials simultaneously treated white students with respect. Congress did not intend, and the Court should not allow, such a perverse misreading of §§ 1981 and 2000a.

As Justice Goldberg previously recognized, the Civil Rights Act of 1964 (which includes § 2000a) was aimed at the "vindication of human dignity and not mere economics." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 291 (1964) (Goldberg, J., concurring). Quoting the Senate Commerce Committee, Justice Goldberg explained:

> [t]he primary purpose of the Civil Rights Act of 1964 was to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color.

Id. at 291-292 (quoting S. Rep. No. 872, 88th Cong., 2d Sess., 16).

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[12] *See Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954) (rejecting *Plessy* and ruling that "separate but equal" educational facilities were inherently unequal and deprived minority students of the equal protection of the laws guaranteed by the Fourteenth Amendment).

The Fifth Circuit's ruling that Conoco's racially abusive treatment of Arguello and Govea is not actionable under § 1981 and that they lack standing under § 2000a ignores Justice Goldberg's realization that "discrimination is not simply dollars and cents." *See id.* Certiorari is appropriate to correct the Fifth Circuit's overly narrow and untenable reading of § 1981 and § 2000a.

C. The Fifth Circuit's § 2000a Ruling Conflicts with Plain Statutory Terms and Abolishes a Congressional Guarantee of Remedy for Race Discrimination in Places of Public Accommodation

Certiorari should be granted on Question 2 because the Fifth Circuit's ruling that Arguello and Govea lacked standing to seek injunctive relief under 42 U.S.C. § 2000a nullifies the plain terms of the statute and renders § 2000a's protections meaningless. Further, granting certiorari on this question will allow the Court to decide whether *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) applies in the context of § 2000a claims, when *Lyons* was brought under 42 U.S.C. § 1983 and involved both federalism concerns and claims for monetary relief, neither of which are involved here. Because applying *Lyons* in this context negates the plain terms of the statute and renders § 2000a's protections meaningless, the Court should grant certiorari to decide the issue and specify the requirements for standing for injunctive relief under § 2000a.

1. Section 2000a-3(a) Allows Prior Discrimination Victims to Seek Injunctions Without Proving Future Discrimination

Section 2000a(a) guarantees that all persons are protected from race discrimination in places of public accommodation. Section 2000a-2 makes it unlawful for any person to deprive or attempt to deprive any person of that right. If a person tries to do so, the victim is authorized by § 2000a-3(a) to

bring an action for injunctive relief. Unlike other civil rights laws, the victim is not entitled to any monetary damages. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-02 (1968).

Section 2000a-3(a) makes plain that an action for injunctive relief can be brought based on a single, prior incident of race discrimination. It states:

> Whenever any person *has engaged* **or** *there are reasonable grounds to believe that any person is about to engage in* any act or practice prohibited by § 2000a-2 . . . , a civil action for preventive relief, including an application for a permanent or temporary injunction . . . may be instituted by the person aggrieved.

42 U.S.C. § 2000a-3(a) (emphasis added).

The Fifth Circuit's ruling ignores the plain language of the statute and treats the word "or" as "and." Congress cannot have meant to require an aggrieved person, to have standing, to prove the existence of reasonable grounds to believe a person was about to engage in a prohibited act where Congress, by using the word "or," made such a showing an alternate basis for standing. Certiorari should be granted because the Fifth Circuit's ruling defies the express wording of § 2000a-3(a).

Further, by requiring proof that future discrimination in public accommodations to the aggrieved person is likely, given the common sense of most victims of abuse to try to avoid re-injury, the Fifth Circuit rule narrows the injunctive tool of § 2000a-3(a) so it applies only in those rare instances where an aggrieved person can show both that she will knowingly again submit to racially abusive treatment and that the wrongdoer is unrepentant. On the facts of this case, though Conoco would meet the second prong (by showing no remorse and taking no corrective action), a court could find that Arguello and Govea had "learned their lesson" and

would not go back to Conoco. This defies the broad remedial goals of § 2000a-3(a) and is a basis for this Court to grant certiorari.

2. *City of Los Angeles v. Lyons* is Distinguishable and Should Not Apply to § 2000a claims

The Fifth Circuit and the district court ruled that Arguello and Govea lacked standing for injunctive relief based on *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), which involved a claim under 42 U.S.C. § 1983 by a plaintiff seeking damages and injunctive relief because of chokeholds used on him by Los Angeles police officers. *Id.*, 461 U.S. at 97-98. Lyons sought both monetary damages and an injunction barring the use of the chokeholds except in certain situations. *Id.*

The Court ruled that Lyons lacked standing to seek injunctive relief because he could not demonstrate that he was likely to suffer future injury from the use of the chokeholds. *Id.* at 105. The Court also discussed federalism concerns as an additional reason why no injunction should be granted under those circumstances, as the Court recognized that "the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal laws . . . ." *Id.* at 112.[13] Significantly, the Court noted that withholding injunctive relief under those circumstances did not mean that the "federal law will exercise no deterrent effect" because Lyons could seek monetary damages under § 1983, *see id.*, damages which are not available under § 2000a-3(a).[14]

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[13] Cindy Smith worked for Conoco, not the State of Texas. No such federalism concerns exist in this case.

[14] In contrast, § 2000a entitles plaintiffs only to injunctive relief, not damages. 42 U.S.C. § 2000a-3(a); *see Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. at 401.

The Fifth Circuit's reliance on *Lyons* is wrong. First, it virtually nullifies § 2000a-3(a), in that § 2000a-3(a) plainly provides that victims of prior discrimination in places of public accommodation can pursue actions for injunctive relief. Second, *Lyons* is distinguishable in a number of ways, including the fact that *Lyons* is a § 1983 case, not a § 2000a case, and because *Lyons* involved important federalism concerns that are not present here. The wording of § 1983 is markedly different from that of § 2000a-3(a). The former makes the wrongdoer "liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." The latter, § 2000a-3(a), expressly provides standing to an aggrieved person to sue for injunctive relief where any person "has engaged or there are reasonable grounds to believe" the person may engage in public accommodations discrimination. Further, there is disconcerting irony in the Fifth Circuit's reliance on *Lyons* in this case, where the court refused ***both*** injunctive relief ***and*** took away the jury's damage verdict against Conoco. In tandem, these actions wipe out any deterrent effect under federal law—exactly the result this Court said would not occur in *Lyons*. 461 U.S. at 112.

Policy considerations weigh against requiring a victim of race discrimination in public accommodations cases to prove that he will again be a victim of racial discrimination before he has standing to seek injunctive relief. This is contrary both to the language and the spirit of Title II's protections. Taken to its extreme, for persons with a mindset to engage in race discrimination, such a requirement actually ***encourages*** places of public accommodation to more egregiously violate Title II in order to so seriously injure or damage victims of discrimination that they never again risk stepping foot on defendant's property for racial abuse. Such a rule yields absurd results and is contrary to public policy and should, therefore, be contrary to law.

Title II should not be interpreted so narrowly, for it contradicts both the language and spirit of the law. Injunctive relief is appropriate when a place of public accommodation ***has engaged in*** the acts prohibited by § 2000a-2. *See* § 2000a-3(a). Further, a narrow interpretation of Title II encourages would-be violators to more seriously injure or humiliate victims so that the victims (and their minority friends and relatives) stay away. In this case Conoco abused Arguello and Govea in front of family and strangers, on a simple stop at a store, on their way to a family picnic. The profane racial abuse rose to a degree that would discourage them from returning to any Conoco station. In light of the treatment Arguello, Govea, and other minority customers have suffered at Conoco's stores, and in light of Conoco's failure to make any substantive changes in policies or training after becoming aware of racial discrimination in its stores, injunctive relief is the only way that the Court can accomplish the overriding purpose of Title II—to secure for all people the full and equal enjoyment of Conoco stores and other places of public accommodation.

CONCLUSION

The Court is again faced with an historic civil rights case that will test and determine the strength of the nation's laws against race discrimination. The Court should grant certiorari in order to once again demonstrate that § 1981 and § 2000a have practical meaning and effect. Both the legislative histories and the plain statutory terms of § 1981 and § 2000a indicate that Arguello and Govea are entitled to monetary and injunctive relief for the race discrimination they suffered. The Fifth Circuit's ruling is contrary to those legislative histories, plain statutory language, and to the public policy against race discrimination. This Court should reconstruct what the Fifth Circuit has destroyed.

Congress intended for § 1981 and § 2000a to be more than mere paper guarantees. When introducing the bill that ultimately became the Civil Rights Act of 1866, the source from which § 1981 is derived, Senator Trumbull stated that he regarded the bill

> as the most important measure that has been under [the Senate's] consideration since the adoption of the constitutional amendment abolishing slavery. That amendment declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits.

Jones v. Alfred H. Mayer & Co., 392 U.S. 409, 431-32, n. 51 (1968) (quoting Cong. Globe, 39th Cong., 1st Sess., 474).

Senator Trumbull's statement remains as true today as it was in 1866. Unless consumers are protected from racial harassment during their attempts to purchase goods, and unless victims of race discrimination in places of public accommodation have legal recourse, § 1981 and § 2000a will be nothing more than mere paper guarantees.

Unless certiorari is granted, Congress' vision of freedom, equality and justice for all persons, regardless of race, will remain unrealized, and consumers in Texas, Louisiana, and Mississippi will have no legal, civil, or practical protection from the overt race discrimination that unfortunately continues to this day.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

[Filed May 5, 2003]

No. 01-11549

DENISE ARGUELLO, ET AL.,
Plaintiffs,

DENISE ARGUELLO AND ALBERTO GOVEA,
Plaintiffs-Appellants,

VERSUS

CONOCO, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

Before SMITH, BARKSDALE, and EMILIO M. GARZA,
Circuit Judges.

JERRY E. SMITH, *Circuit Judge*:

Denise Arguello and Alberto Govea appeal (1) a judgment as a matter of law ("j.m.l.") on their claims of race discrimination in violation of 42 U.S.C. § 1981 and (2) the denial of their claims for injunctive relief under 42 U.S.C. § 2000a. Arguello and Govea, both of whom are Hispanic, entered a store owned by Conoco, Inc. ("Conoco"), intending to purchase gasoline and other items. There was a heated confrontation, during which the employee made several racially derisive remarks. Arguello and Govea allege that they were deprived of their ability to enter into a contract on

nondiscriminatory terms as prohibited by § 1981. The jury decided for plaintiffs, but the district court granted Conoco's motion for j.m.l. under FED. R. CIV. P. (50)(b). *See Arguello v. Conoco, Inc.*, 2001 U.S. Dist. LEXIS 18471 (N.D. Tex. Nov. 9, 2001) (No. 397-CV-0638-H). Finding no error, we affirm.

I.

Arguello and Govea stopped with their family at a Conoco store. After Arguello's husband pumped gas into her car, Arguello and Govea (her father) went inside to pay for the gas and buy some beer. As they stood in line, Cindy Smith, one of the two clerks on duty, waited on other customers. Arguello testified that Smith was rude to her when she reached the counter and that her demeanor was less friendly than it had been with the customers she had previously served. After Arguello presented her credit card as payment, Smith requested identification. Arguello testified that Smith singled her out by demanding that she provide identification; Smith contends that she requested identification because Arguello was attempting to buy beer.

Arguello, an Oklahoma resident, presented Smith with her valid Oklahoma driver's license. Smith initially refused to accept it, claiming she could not take an out-of-state license, but she eventually accepted it and completed the transaction. During Arguello's purchase, Govea became increasingly frustrated with the manner in which Smith was treating his daughter. Consequently, he left the beer he had intended to purchase on the counter and walked out of the store.

After Smith completed Arguello's sale, the tension between them escalated into a confrontation. Arguello testified that Smith began shouting obscenities at her and making racially derogatory remarks. Arguello began to leave with her purchase, but realized that she had the wrong copy of the credit card slip and approached the counter again. After

another argument, Arguello and Smith exchanged copies. As Arguello walked away the second time, Smith shoved a six-pack of beer off the counter and onto the floor.

Plaintiffs testified that after Arguello left the store, Smith began screaming racist remarks over the intercom. At the same time, Smith laughed at Arguello and her family and made several crude gestures. Govea and other family members telephoned Conoco from a payphone outside the store to lodge a complaint. During that telephone conversation, the Conoco official indicated that he wanted to know the name of the clerk in question. When Govea attempted to reenter the store to determine Smith's name, Smith locked him out while laughing and making crude gestures.

Arguello and Govea sued Conoco under 42 U.S.C. §§ 1981 and 2000a.[1] The jury found for plaintiffs on the § 1981 claim and awarded compensatory and punitive damages. The court granted j.m.l., finding that the record provided no basis upon which a reasonable jury could conclude that plaintiffs were prevented, on a discriminatory basis, from entering into a contractual relationship in violation of § 1981.

II.

We review a j.m.l. *de novo*. *Coffel v. Stryker Corp.*, 284 F.3d 625, 630 (5th Cir. 2002). A j.m.l. is appropriate only where "there is no legally sufficient basis for a reasonable jury to find for [a] party." FED. R. CIV. P. 50(a)(1); *accord*

[1] As initially filed, the suit included claims by various additional plaintiffs alleging that Conoco was in violation of §§ 1981 and 2000a and state law for subjecting minority customers to substandard service and racially derogatory remarks. The district court dismissed or granted summary judgment for defendants on all claims. On appeal, a panel of this court reinstated and remanded for trial the claims raised by Arguello and Govea in this appeal, but affirmed the rejection of all other claims and plaintiffs. *See Arguello v. Conoco, Inc.*, 207 F.3d 803, 813 (5th Cir. 2000).

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 139 (2000). Thus, a motion for j.m.l. in a jury case is a challenge to the sufficiency of the evidence supporting the verdict. *Flowers v. S. Reg'l Physician Servs.*, 247 F.3d 229, 235 (5th Cir. 2001).

In assessing the legal sufficiency of the evidence, we consider the entire trial record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor. *Burch v. Coca-Cola Co.*, 119 F.3d 305, 313 (5th Cir. 1997). An issue is properly submitted to the jury where there is a conflict in substantial evidence--"evidence of such quality and weight that reasonable and fairminded men in the exercise of impartial judgment might reach different conclusions." *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc), *overruled on other grounds, Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc).

To succeed on a § 1981 claim, a plaintiff must establish "(1) that she is a member of a racial minority; (2) that [the defendant] had intent to discriminate on the basis of race; and (3) that the discrimination concerned one or more of the activities enumerated in the statute. *Morris v. Dillard Dept Stores, Inc.*, 277 F.3d 743, 751 (5th Cir. 2001). The first element is not disputed--all parties concede that Arguello and Govea are Hispanic. Further, the testimonial and other evidence provides a basis for concluding that Smith subjected Arguello to substandard service. In conjunction with that evidence of maltreatment, the testimony regarding the racially charged nature of Smith's comments sufficed to create a jury question regarding whether Smith intentionally discriminated against plaintiffs on the basis of race. Therefore, this case turns on the third element, namely, whether Smith's conduct implicated rights guaranteed by § 1981.

A.

Section 1981 does not provide a general cause of action for race discrimination.[2] Rather, it prohibits intentional race discrimination with respect to certain enumerated activities.[3] At issue here is plaintiffs' ability "to make and enforce contracts" on nondiscriminatory terms. 42 U.S.C. § 1981(a).

To establish a deprivation of § 1981 rights in the retail context, the plaintiff must demonstrate "the loss of an actual, not speculative or prospective, contract interest."[4] An allegation of "the mere possibility that a retail merchant would interfere with a customer's right to contract in the future" is insufficient to support recovery under § 1981. *Morris*, 277 F.3d at 752 (collecting cases). Instead, the plaintiff "must offer evidence of some tangible attempt to contract" that in some way was "thwarted" by the defendant. *Id.*

The law in this circuit for § 1981 claims in the *retail* context is established by *Morris*. There, this court plainly stated the rule that "where a customer has engaged in an

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[2] *Garrett v. Tandy Corp.*, 295 F.3d 94, 100 (1st Cir. 2002); *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 855 (8th Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002); *Hampton v. Dillard Dept Stores, Inc.*, 247 F.3d 1091, 1118 (10th Cir. 2001).

[3] 42 U.S.C. § 1981(a) provides that

> [a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[4] *Morris*, 277 F.3d at 751-52; *see also Bellows v. Amoco Oil Co.*, 118 F.3d 268, 275 (5th Cir. 1997) (denying recovery under § 1981 because plaintiff failed to introduce evidence that defendant actually interfered with the contract).

actual attempt to contract *that was thwarted by the merchant,* courts have been willing to recognize a § 1981 claim." *Morris,* 277 F.3d at 752 (emphasis added.) The *Morris* court cited with approval, *inter alia, Henderson v. Jewel Food Stores, Inc.,* 1996 U.S. Dist. LEXIS 15796 (N.D. Ill. Oct. 23, 1996) (No. 96-C-3666), as "holding that 'a § 1981 claim must allege that the plaintiff was *"actually prevented, and not merely deterred,* from making a purchase or receiving service after attempting to do so.'" *Morris, id.* (emphasis added). The *Morris* court summarized its holding by stating that "Morris must offer evidence of some tangible attempt to contract with Dillard's during the course of the ban, which could give rise to a contractual duty between her and the merchant, *and which was in some way thwarted." Id.* (emphasis added).[5]

Govea cannot make that showing. Although his decision to abandon his purchase resulted from Smith's mistreatment of his daughter, Smith did not actually interfere with an attempted purchase. According to Govea's own testimony, he voluntarily set the beer on the counter and left without trying to buy it. Consequently, there is no basis on which a reasonable jury could conclude that Smith prevented Govea from making a purchase. Nor can Smith's later conduct in locking him out of the store support a claim under § 1981, because his subsequent attempts to gain entry into the store were, again by his own admission, not to buy anything but to determine Smith's name so he could provide it to a Conoco representative.

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[5] At least one circuit has embraced *Morris,* and none has questioned it. In *Garrett, 295* F.3d at 100-101, the court held that "to satisfy the foundational pleading requirements for a suit under section 1981, a retail customer must allege that he was actually denied the ability either to make, perform, enforce, modify, or terminate a contract, or to enjoy the fruits of a contractual relationship, by reason of a race-based animus."

B.

Arguello likewise cannot establish interference with an actual contract interest. Her claim must fail, because she successfully completed the transaction.[6] Having received all she was entitled to under the retail-sales contract, she cannot demonstrate any loss recoverable under § 1981.[7]

1.

Plaintiffs argue for a broader interpretation of the § 1981 right to "make and enforce contracts" on equal terms such that it would cover conduct occurring after the consummation of a retail-sales contract. They note that 42 U.S.C. § 1981(b), enacted as part of the Civil Rights Act of 1991, extends the reach of § 1981 by defining the term "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

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[6] There was some question whether Arguello intended to purchase the beer left behind by her father when he exited the store. Arguello testified that she had expected Smith to ring up her father's beer along with her purchases. She asserts that, absent Smith's offensive behavior, she would have purchased the beer in a second, separate transaction.

Irrespective of whether Arguello intended to make the purchase, the only action she took with respect to the beer was to slide it across the counter nearer to her purchases after her father left the store. After she completed her purchase, it was obvious that she had not bought her father's beer. Nevertheless, she did not tell Smith that she desired to purchase it, and she took no other action that would indicate that she intended to do so. Her conduct therefore did not constitute an actual attempt to contract and provides insufficient support for a claim under § 1981.

[7] *Cf. Hampton, 247* F.3d at 1118 ("We are aligned with all the courts that have addressed the issue that there must have been interference with a contract beyond the mere expectation of being treated without discrimination while shopping.").

This provision was enacted as a direct response to the narrow view of § 1981 expressed in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). The enactment of § 1981(b) was an explicit rejection of *Patterson,* in which the Court had refused to impose liability for discriminatory conduct occurring after the formation of an employment contract. The new provision displaced *Patterson's* understanding of § 1981 by expanding the statute's reach to "all phases and incidents of the contractual relationship." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 306-07 (1994).

Arguello and Govea correctly observe that under § 1981, the "making" of a contract must include the opportunity to enter into negotiations on equal terms. That much was true even before the 1991 modification of the statute. Plaintiffs go further, however, and argue that in light of Congress's response to *Patterson,* the statute should be read to impose liability for racial discrimination or harassment occurring after the formation of any contract.

There is a significant distinction, however, between employment agreements and retail transactions. A contract for employment involves a continuing contractual relationship that lasts for the duration of the agreement. As a result of the 1991 amendments, the right to enjoy the benefits of that relationship on a nondiscriminatory basis remains enforceable under § 1981 so long as the relationship continues.

In the retail context, by contrast, there is no continuing contractual relationship. Instead, the relationship is based on a single discrete transaction—the purchase of goods.[8]

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[8] A sale is defined as a contract between two parties involving the transfer of property in consideration of the payment of a certain price in money. BLACK'S LAW DICTIONARY 1337 (6th ed. 1990); *Grinnell Corp. v. United States,* 390 F.2d 932, 947-48 (Ct. Cl. 1968)(citing *Comm'r of Internal Revenue v. Brown,* 380 U.S. 563, 571 (1965); *see also Eusco, Inc. v. Huddleston,* 835 S.W.2d 576, 579 (Tenn. 1992) ("The

Therefore, the appropriate comparison is not the application of § 1981 during the period in which an employment contract is in force. Rather, what Arguello and Govea are claiming in the retail context is akin to the use of § 1981 to enforce rights under an employment contract that has already expired.

2.

The remaining cases Arguello and Govea cite for the proposition that a § 1981 plaintiff may recover despite having successfully completed his purchase fall into two broad categories. The first group involves discriminatory service in restaurants and clubs. These cases are easily distinguishable, because dining at a restaurant generally involves a contractual relationship that continues over the course of the meal and entitles the customer to benefits in addition to the meal purchased.[9] Restaurants are, in that respect, significantly different from retail establishments.

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elements necessary to constitute a sale are (1) a transfer of title or possession, or both of (2) tangible personal property, for a (3) consideration.") (citation and internal quotation marks omitted); *Berger v. Alaska*, 910 P.2d 581, 586 (1996) (Alaska 1996) ("A sale is the payment of money by a buyer to a seller in exchange for title and possession of property."); *Youngblood*, 266 F.3d at 854 ("[T]he key is whether any contractual duty remained after [plaintiff] made his purchase. Once [he] paid the cashier and received [his purchase] . . ., neither party owed the other any duty under the retail-sales contract.") In the retail context, the exchange of goods for payment occurs simultaneously, and thus any contractual obligations are quite limited in duration.

[9] *See McCaleb v. Pizza Hut of Am., Inc.*, 28 F. Supp.2d 1043 (N.D. Ill. 1998) ("[Pizza Hut] failed to provide [the customers] the full benefits of the contract in that, among other things, they failed to provide [the customers] with the proper utensils and created a disturbing atmosphere in which to eat."); *Charity v. Denny's, Inc.*, 1999 LEXIS 11462, at *11 (E.D. La. 1999) ("[I]t could reasonably be said that a customer who enters a restaurant for service is contracting for more than just food . . . . Dining in a restaurant includes being served in an atmosphere which a reasonable person would expect in the chosen place.").

The second category is cases involving discriminatory prepayment or check-writing policies.[10] There, the plaintiff does not have to demonstrate inability to contract, because discriminatory contractual terms violate § 1981 even if parties willingly enter into the contracts.[11] The plaintiff is able to show the loss of an actual contractual interest merely by demonstrating that he was party to a discriminatory contract.

In this case, however, there are no allegations of discriminatory contractual terms. Arguello paid the same price for her purchase as any other customer would have, and she was not required to use a nonpreferred payment method. Each of the incidents of the contract was identical to that which would apply to any other customer. When one views Arguello's claim in this light, it is apparent that her only complaint is Smith's offensive conduct. Egregious as that conduct may have been, it neither prevented the formation of a contract nor altered the substantive terms on which the contract was made.

III.

Arguello and Govea appeal the denial, for want of standing, of their claim for injunctive relief under § 2000a. We review questions of standing *de novo*. *Castillo v. Cameron County,* 238 F.3d 339, 347 (5th Cir. 2001).

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[10] *Hill v. Shell Oil Co.,* 78 F. Supp.2d 764 (N.D. Ill. 1999) (holding that customers could proceed with § 1981 claims despite the fact that they completed their purchases, because the gas station had a discriminatory prepayment policy); *Hill v. Amoco Oil Co.,* 2001 U.S. Dist. LEXIS 3082 (N.D. Ill. Mar. 19, 2001) (No. 97-C-7501) (same); *Buchanan v. Consol. Stores Corp.,* 125 F. Supp.2d 730 (D. Md. 2001) (holding that customers could proceed with § 1981 claim based on discriminatory check writing policy).

[11] According to § 1981(a), read in conjunction with § 1981(b), the right to make and enforce contracts includes the right to enjoy "benefits, privileges, terms, and conditions of the contractual relationship" on a nondiscriminatory basis.

"It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v. Lyons,* 461 U.S. 95, 101 (1983) (citations omitted). If a litigant is unable to establish standing, he may not seek relief on behalf of any party. *James v. City of Dallas*, 254 F.3d 551, 563 (citing *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)).

In addition to the general standing requirements of injury in fact, causation, and redressability, a litigant seeking injunctive relief must demonstrate "that [he is] likely to suffer future injury by the defendant and that the sought-after relief will prevent that future injury." *Id.* Although Arguello and Govea allege past wrongful conduct by Conoco, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief." *Lyons*, 461 U.S. at 102 (citation and internal quotation marks omitted). Moreover, if Arguello and Govea have no cause of action under § 1981, they have no closer relationship to future conduct than does any member of the general public.

AFFIRMED.[12]

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[12] Plaintiffs challenge the exclusion of evidence of complaints of racial discrimination by other Conoco employees at other Conoco stores. The excluded evidence, however, would have no impact on our disposition of their substantive claims, and, as we have explained, they have no standing to pursue an injunction.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed Aug. 17, 2001]

Civil Action No. 3:97-CV-0638-H

DENISE ARGUELLO and ALBERTO GOVEA,
Plaintiffs,

v.

CONOCO, INC.,
Defendant.

FINAL JUDGMENT

This Judgment is entered pursuant to the Partial Judgment, filed July 25, 2001, and the Court's Order, filed August 16, 2001. The Partial Judgment is incorporated in this Final Judgment.

IT IS ORDERED, ADJUDGED AND DECREED by the Court as follows:

Plaintiff Denise Arguello shall have and recover of and from Defendant Conoco, Inc. the sum of Five Hundred Fifty Thousand Dollars ($550,000.00).

Plaintiff Alberto Govea shall have and recover of and from Defendant Conoco, Inc. the sum of Two Hundred Seventy-Five Thousand Dollars ($275,000.00).

Plaintiffs' claim for injunctive relief under 42 U.S.C. § 2000a is DENIED.

SIGNED this 17th day of August, 2001.

/s/ Barefoot Sanders
BAREFOOT SANDERS, SENIOR JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed Nov. 9, 2001]

Civil Action No. 3:97-CV-0638-H

DENISE ARGUELLO and ALBERTO GOVEA,
Plaintiffs,

v.

CONOCO, INC.,
Defendant.

JUDGMENT

This Judgment is entered pursuant to the Court's Memorandum Opinion and Order dated November 8, 2001.

IT IS ORDERED, ADJUDGED AND DECREED by the Court as follows:

Defendant Conoco's Renewed Motion for Judgment, filed August 8, 2001, is GRANTED. Final Judgment entered August 17, 2001, is set aside and this Judgment entered in lieu thereof.

Plaintiffs Denise Arguello and Alberto Govea take nothing by their suit against Defendant Conoco, Inc., and Plaintiffs' claims are DISMISSED on the merits at Plaintiffs' cost.

Any relief sought by any party and not granted herein is DENIED.

SIGNED this 9th day of November, 2001.

/s/ Barefoot Sanders

BAREFOOT SANDERS, SENIOR JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed Nov. 9, 2001]

Civil Action No. 3:97-CV-0638-H

DENISE ARGUELLO and ALBERTO GOVEA,
Plaintiffs,

v.

CONOCO, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER

Before the Court is Conoco's Renewed Motion for Judgment or, in the Alternative, Motion for New Trial, filed August 8, 2001, and Plaintiffs' Response in Opposition, filed August 22, 2001.

I. BACKGROUND

On March 26, 1995, Denise Arguello and her father Alberto Govea, both of whom are Hispanic, stopped at a Conoco gas station in Fort Worth to purchase gas and other items. The clerk on duty was Cindy Smith. Plaintiffs claim Smith was immediately rude when Arguello approached the counter. Govea was behind Arguello in line. Arguello believed Smith had singled her out by requesting identification. Smith threatened not accept Arguello's drivers' license since it was from Oklahoma, but she eventually relented. During Arguello's purchase, Govea became frustrated with how he perceived Smith was treating his daughter. He left the beer he had intended to purchase with

Arguello and departed the store. Arguello did not attempt to purchase Govea's beer. After Smith completed Arguello's sale, the tension between Arguello and Smith escalated into a confrontation. Arguello alleges Smith referred to her as a "f***ing Iranian Mexican bitch." Arguello also alleges that after she left the store, Smith began screaming racist remarks over the store's intercom. At the same time, Smith laughed at Arguello and her family and displayed several crude gestures. Govea and other family members then telephoned Conoco from a payphone outside the store to lodge a complaint. During the telephone conversation, the Conoco official indicated he wanted to know the name of the clerk in question. When Mr. Govea attempted to reenter the store to determine Smith's name (it was then unknown to him), Smith locked him out. Apparently, Smith was again laughing and displaying crude gestures. Govea alleges that Smith admitted she was discriminating against them as they spoke through the locked door.[1]

Arguello and Govea brought this racial discrimination case against Conoco under 42 U.S.C. § 1981. Plaintiffs allege that they suffered discriminatory and abusive treatment that deprived them of the right to contract as protected by § 1981. Following a trial on the merits, a jury returned a verdict in favor of plaintiffs. Arguello was awarded $550,000 in damages ($50,000 compensatory and $500,000 punitive). The jury awarded Govea $275,000 ($25,000 compensatory and $250,000 punitive). The defendants timely filed a motion for judgment under FED. R. CIV. P. 50(b), or, alternatively, a motion for new trial under FED. R. CIV. P. 59. As the Court resolves this motion on Rule 50 grounds, it will not reach the motion for new trial under Rule 59.

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[1] The Court notes that Smith's version of these events is almost entirely different. *See* Transcript ("Tr."), Vol. Ib, p. 2-73.

II. STANDARD OF REVIEW

Parties agree that liability in this case is premised on 42 U.S.C. § 1981, and that the relevant statutory language from § 1981 controls:

> (a) All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . .
>
> (b) For the purpose of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

To establish a § 1981 claim, a plaintiff must show: (1) he or she is a member of a racial minority; (2) the defendant had an intent to discriminate on the basis of race; and (3) the discrimination concerned an activity enumerated in the statute. *See Bellows v. Amoco Oil,* 118 F.3d 268, 274 (5th Cir.), *cert. denied,* 522 U.S. 1068 (1998); *Green v. State Bar of Texas, 27* F.3d 1083,1086 (5th Cir. 1994). As in *Bellows*, the relevant statutory right in this case is the making and enforcing of a contract. *See Bellows,* 118 F.3d at 274.

The standard to be applied to a motion for judgment as a matter of law, or judgment notwithstanding the verdict ("judgment n.o.v."), is the same as that applied to a motion for a directed verdict. *See Long v. Shultz Cattle Co.,* 881 F.2d 129, 132 (5th Cir. 1989). To grant such a motion, the Court must construe the entire record of the case in the light most favorable to the nonmovant and find that the evidence is so overwhelmingly in favor of the moving party that no reasonable juror could have arrived at the challenged verdict. *See* FED. R. CIV. P. 50(a); *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 149-51 (2000). A defendant is entitled to judgment when the plaintiff fails to produce sufficient admissible evidence to support an essential

element of the cause of action. *See Boeing Co. v. Shipman,* 411 F.2d 365, 375 (5th Cir. 1969) (en bane), *overruled on other grounds by Gautreaux v. Scurlock Marine, Inc.,* 107 F.3d 331, 336-37 (5th Cir. 1997) (en banc).

With these legal standards in mind, the Court now turns to Conoco's motion for judgment as a matter of law.

III. ARGUELLO' S CLAIM

Conoco argues that Arguello's claim fails as a matter of law because she failed to produce any evidence that Smith's discriminatory conduct resulted in the loss of a contractual interest. *See* Conoco Brief, at 3-4. Conoco correctly argues that Arguello was required to demonstrate the actual loss of a contractual interest. *See Morris v. Office Max, Inc.,* 89 F.3d 411, 414-15 (7th Cir. 1996). A claim based on the possible loss of future contractual opportunities does not state a claim under § 1981. *See id.* Arguello had to demonstrate that she was actually prevented from making a purchase by Conoco's discriminatory actions in order to state a claim under § 1981. *See id.; Rogers v. Elliot,* 135 F.Supp.2d 1312, 1315 (N.D. Ga. 2001) (noting that virtually all federal courts that have analyzed § 1981 have held a plaintiff must show she was actually prevented from making a purchase in order to state a claim).

Before reaching Arguello's claim, a brief discussion of the previously cited *Morris* and *Rogers* cases is helpful to the Court's analysis. In *Morris,* an Office Max manager called the police to investigate two African-American shoppers who had entered the store shortly before closing. The plaintiffs were the only African-American customers in the store at that time. The plaintiffs made a purchase, but stayed in the store examining other merchandise. After the police arrived, they asked the plaintiffs some questions and requested identification. The police then apologized and left. The plaintiffs brought suit under § 1981 claiming that the Office Max

employee called the police only because plaintiffs were African-American, and as such, interfered with their right to make and enforce contracts. The plaintiffs specifically referenced a stamp machine that they were considering purchasing when approached by the police. *See Morris, 89* F.3d at 411-12. The Seventh Circuit affirmed the trial court's summary judgment based on the fact that the plaintiffs made no showing that Office Max interfered with their right to make further purchases or enter into retail contracts. *See id.* at 412-14. The court noted that the plaintiffs were not denied admittance or service, nor were they asked to leave the store. *See id.* at 414. The court held that a claim for interference with the right to make and enforce contracts must allege the actual loss of a contractual interest, not merely the possible loss of contractual opportunities in the future. *See id.* at 414-15.

In a ruling similar to *Morris,* the *Rogers* court recently granted summary judgment on a § 1981 claim. In that case, the plaintiffs (Ms. Rogers and her two sons) were shopping at Wal-Mart. At the checkout, Rogers informed her sons they could choose some treats from a candy display. The children chose their items, and the checker scanned them. As one of the children walked away from the checkout, another checker named Ms. Elliot, who was not involved in Rogers' transaction, yelled at the child to get back to the checkout and pay for the candy. Rogers informed Elliot that she had already paid for the candy. *See Rogers,* 135 F.Supp.2d at 1313. As Rogers walked to the exit with her children, Elliot allegedly said: "Hey Bitch, have a nice day." *Id.* As Rogers was looking for a manager to report Elliot's conduct, Elliot allegedly assaulted Rogers by pulling her hair, punching and scratching her. While assaulting her, Elliot referred to Rogers as a "stealing nigger" and a "bitch," *Id.* In granting summary judgment in favor of Elliot and Wal-Mart on Rogers § 1981 claim, the Court noted that Rogers was not denied the right to make and enforce a contract. *See id.* at 1315. She had already

completed her purchase by the time of the altercation, and was not prevented from making another purchase. *See id.* The court found Rogers was not prevented from doing anything, except perhaps exiting the store. *See id.* As such, Rogers was not denied any rights protected by § 1981. *See id.* at 1314-15.

Turning to Arguello's claim, she, like Rogers, was able to complete her purchase. *See* Tr. Vol. lb, p. 82-85; 125-29. Arguello stated that she intended to purchase beer and gas. She also testified that her father, who had accompanied her inside, also wanted to purchase some beer. *See id.* at 76-79. Viewing the evidence in the light most favorable to Arguello, Smith provided Arguello with woefully substandard service. Smith also harassed, insulted, and disparaged Arguello due to her ethnic background. Smith did not, however, prevent Arguello from completing the sales transaction and purchasing the goods she desired. She was denied no rights protected by § 1981. *See Morris*, 89 F.3d at 414-15; *Rogers*, 135 F.Supp.2d at 1315. Accordingly, Arguello's transaction cannot be the basis for recovery under § 1981. *See Bellows*, 118 F.3d at 274.

Apart from Arguello's own purchase, plaintiffs point out that Govea left his beer with Arguello and she intended to purchase it for him. *See* Tr. Vol. lb, p. 86; Tr. Vol. 2, p. 93-94. Arguello testified that she did not purchase Govea's beer because she did not want to begin another transaction with Smith; Arguello testified she ". . . couldn't take it all over again." Tr. Vol. lb, 86-87. Plaintiffs essentially argue that Smith's racially abusive behavior prevented Arguello from purchasing the beer left by Govea. The Court notes that the confrontation between Arguello and Smith had escalated substantially by the time Arguello's original transaction was complete. While Arguello testified she wanted to purchase the beer, she made no attempt to purchase it. *See id.* Arguello testified she left the store because she wanted to get away from Smith. *See id.* As Arguello was not actually prevented

by Smith from purchasing Govea's beer, her failure to purchase the beer did not deprive her of a contractual right under § 1981. *See Morris*, 89 F.3d at 414-15; *Rogers*, 135 F.Supp.2d at 1315.

In opposition to Conoco's motion, Arguello cites to several § 1981 cases in the restaurant context (collectively "the restaurant cases"). *See, e.g., McCaleb v. Pizza Hut of America, Inc.*, 28 F.Supp.2d 1043 (N.D. Ill. 1998). *McCaleb* is illustrative of the restaurant cases cited by Arguello. In that case, African-American plaintiffs had gone to dinner at a local Pizza Hut. They arrived just before closing, but Pizza Hut had a policy of allowing customers to stay and finish their meals. As the McCaleb family entered the restaurant, one of the employees stated "I'm not serving those niggers." *Id.* at 1046. After plaintiffs were seated, Pizza Hut provided no plates or silverware; the plaintiffs had to go to the counter and request both. After inquiring about drinks, plaintiffs were informed the drink machine had been turned off; plaintiffs were refused drinks. After ordering their pizzas for dine-in service, the pizzas were prepared in take-away boxes. The pizzas were not delivered to the table, instead a member of the family had to retrieve them for the table. After the plaintiffs began eating their pizza, several Pizza Hut employees played very loud music, repeatedly turned the lights on and off, and committed other actions aimed at disrupting the McCaleb's meal. Unable to complete their meal, the family left. As the family left, Pizza Hut employees yelled racially derogatory remarks. One employee even took up a threatening position with a stick. *See id.* at 1046-47. The court denied summary judgment. The court pointed out that utensils and a proper dining atmosphere must be considered elements of a restaurant contract. *See id.* at 1048. The court also pointed out that Pizza Hut's employees succeeded in their effort to prevent the plaintiffs from finishing their pizzas. *See id.* Thus, plaintiffs were denied the opportunity to complete their meal contract. Considering these facts with the

fact that plaintiffs were refused the opportunity to purchase drinks, the court found the plaintiffs had stated a claim under § 1981. *See id.* at 1048.

Arguello argues that *McCaleb's* reasoning supports recovery for her confrontation with Smith. Specifically, as it appears to the Court, Arguello argues that she was denied a proper shopping atmosphere by Smith's repeated outbursts. Even though the Court may agree that Arguello was denied a proper shopping atmosphere, that, alone, does not state a claim under § 1981; Arguello must still satisfy the required elements of such a claim. *See Bellows,* 118 F.3d at 274; *Morris,* 89 F.3d at 414-15. In *McCaleb,* the plaintiffs were denied specific elements of the restaurant contract; Pizza Hut also refused to sell drinks to the McCalebs. In fact, the *McCaleb* court distinguished *Morris* on precisely these grounds. *See McCaleb,* 28 F.Supp.2d at 1048. The denial of specific contractual rights was the root of the *McCaleb* court's reasoning. *See id.* at 1048. Unlike Pizza Hut, Conoco never refused to sell Arguello anything. While Smith may been rude and abusive, Arguello completed her contract for the goods she attempted to purchase. She was not denied an opportunity to enter into a contractual relationship, nor was she denied the right to complete a contractual relationship. That is the fundamental distinction between these two cases; it is also why Arguello's claim must fail as a matter of law.[2]

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[2] The Court is equally unpersuaded by Arguello's claim that *Hill v. Shell Oil Co.*, 78 F.Supp.2d 764 (N.D. Ill. 1999) justifies her recovery in this case. In that case, even though plaintiffs were served, the courts found the defendants had violated § 1981 through the use of a racially discriminatory policy that required African-American patrons to pre-pay for their gas while not requiring white customers to pre-pay. The court noted that in *Morris,* the plaintiffs were allowed to carry out their contract to purchase goods at Office Max on the same terms and conditions as white customers. A racially discriminatory pre-pay policy, however, adversely affects the basic terms and conditions of the contractual relationship, i.e. the timing and method of payment. *See id.* at 777. The court

Conoco's motion for judgment as a matter of law as to Arguello's § 1981 claim must be GRANTED. *See Bellows,* 118 F.3d at 274.

IV. GOVEA'S CLAIM

Just as Arguello's claim fails, so must Govea's. There is no evidence in the record that Govea attempted to make a purchase. Govea left the store before reaching the checkout counter. *See* Tr. Vol. 2, p. 93-95. The record indicates that Govea had left the store, or was in the process of leaving, when Smith began her racially discriminatory outbursts. *See* Tr. Vol. lb, p. 83-84, 125-29. When Govea left the store, he had not attempted to purchase anything, nor had he been prevented from purchasing anything. He had only waited in line. *See id.* As such, nothing that occurred before Govea left the store gives rise to a claim under § 1981. *See Bellows*, 118 F.3d at *274; Morris,* 89 F.3d at 414-15. While mentioned only briefly in plaintiff's brief, the record also indicates that Smith locked Govea out of the store following the family's call to Conoco on the outside payphone. The record clearly indicates that Govea attempted to reenter the store only to learn Smith's name, not to make a purchase. *See* Tr. Vol. lb,

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held such conduct directly implicated plaintiffs' right to contract and their right to enjoy the benefits, terms, and conditions of the contractual relationship as protected by § 1981. It also noted that courts across the country have found racially discriminatory pre-pay policies actionable under § 1981. *See id.*

The present case does not implicate the basic terms and conditions of the contractual relationship. The *Hill* court noted that the discriminatory pre-pay requirement subjected plaintiffs to different terms of purchase than white customers. *See id.* The plaintiffs can make no such claim in this case. Arguello does not argue that she was required to pay for her purchase at a different time or in a different manner than non-minority customers. Instead, Arguello's claim is based on the racially discriminatory statements made by Smith during and after her purchase. Smith's discriminatory behavior, unlike that in *Hill,* did not alter the basic terms of the retail sales contract between Arguello and Conoco.

p. 89; Tr. Vol. 2, p. 97. As Govea did not attempt to purchase anything from Smith, nothing that occurred after Govea left the store gives rise to a claim under § 1981. *See Bellows*, 118 F.3d at 274; *Morris,* 89 F.3d at 414-15 (noting the plaintiff must allege the loss of an actual contractual interest, not just the possible loss of future contractual opportunities). Accordingly, Conoco's motion for judgment as a matter of law as to Govea's claim is GRANTED.

V. CONCLUSION

Conoco's motion of judgment as a matter of law is GRANTED as to both Arguello and Govea's claims. Judgment will be entered accordingly.

THE CLERK IS DIRECTED TO IMMEDIATELY FAX THIS MEMORANDUM OPINION AND ORDER TO COUNSEL.

SO ORDERED.

DATED: November 8, 2001.

/s/ Barefoot Sanders
BAREFOOT SANDERS, SENIOR JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed Aug. 16, 2001]

Civil Action No. 3:97-CV-0638-H

DENISE ARGUELLO, *et al.*,
Plaintiffs,

v.

CONOCO, INC.,
Defendant.

ORDER

On August 16, 2001, the Court heard oral argument on Plaintiffs' claim for injunctive relief under 42 U.S.C. § 2000a.

After considering the applicable law, the relevant pleadings and evidence, and the argument of counsel, the Court, for reasons stated from the bench in open court, was of the opinion that Plaintiffs' claim should be, and it was, DENIED.

THE CLERK IS DIRECTED TO IMMEDIATELY FAX THIS ORDER TO COUNSEL.

SO ORDERED.

DATED: August 16, 2001.

/s/ Barefoot Sanders
BAREFOOT SANDERS, SENIOR JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed Mar. 6, 2002]

Civil Action Number 3:97-CV-0638-H
August 16, 2001

DENISE ARGUELLO, *et al.*,
Plaintiff,

versus

CONOCO, INC.,
Defendant.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE BAREFOOT SANDERS
UNITED STATES DISTRICT JUDGE

THE COURT: The court will discuss the matter under discussion at this time. Of course, the question is the plaintiffs entitlement or non-entitlement to relief under 42 USC 2000(a).

I want to say at the outset I appreciate the work that counsel have put in and the force of the arguments made here today. I will not try to recite everything that is before the court by way of documentation, but the court has had occasion to review not only matters which were discussed at the pretrial conference on this aspect of this litigation some time ago--that is, ruling on evidence, deposition designation and exhibits--but also the proposed findings of fact and conclusions of law filed by the parties in the latter part of

June and most recently filed July 27 the trial briefs of the parties, plaintiffs and Conoco's, and then response to plaintiff's trial briefs filed by Conoco.

The clerk and I, law clerk and I have tried to cover the field with respect to 2000(a) cases. The fact that there is some sparseness of cases under 2000(a) shows the difficulties which have been encountered under the statute. It's a relative matter, of course. There are cases there, no question about it, but compared to, say, Title VII, 1983 or civil rights cases are not nearly as many.

The situation with respect to this statute was addressed--well, how it came about initially was pointed out by Ms. Walker, not disagreed with by plaintiffs' (sic) counsel, from the outrageous indignities and wrongs that were suffered by black Americans in the 1960s which this section attempted to correct.

There was then a much brighter line as to what was wrong and what could be remedied than what seems to exist nowadays, and this case, I think, brings that into focus. 2000(a), (a)(1), (a)(2), and (a)(3), or course, prohibit racial discrimination, places of public accommodation. The purpose as pointed out and the cases were cited to support that. I won't burden the record with further cases.

It seems to me that the principle matter that the court is concerned about at the outset is the question of Article 3 standing. The Lions case has received a great deal of discussion here, City of Los Angeles versus Lions, 461 US 95, 103 Supreme Court Reporter at 1616, and the extent to which that case has been cited and followed in 2000(a) cases, and in this circuit, also.

Lions says this, it seems to me, that in order to claim injunctive relief the plaintiff must show a, quote, "real or immediate threat that the plaintiff will be wronged again."

Let me quote the language. Lions—it's not that long. And Lions relies on other Supreme Court language. "It is by now well settled that the irreducable Constitutional minimum of standing contains three elements.

"First, plaintiff must have suffered an injury in fact, an invasion of a legally protected interest that is, A, concrete and particularized, and B, actual or imminent, not conjectural or hypothetical.

"Second, there must be a causal connection between the injury and the conduct.

"Third, it must be likely as opposed to merely speculative that the injury will be redressed by a favorable decision."

In support of that statement, which came out of Lions and is cited by the Fifth Circuit in the recent James days, is U.S. versus Haynes, 515 U.S. 737, 1995 Supreme Court case, and also the Defenders of Wildlife case, which counsel had alluded to and, of course, counsel are familiar.

Then it goes on to say from Lions, "For injunction an additional inquiry, that is additional inquiry so far as standing, is required. Mainly that plaintiffs show that they are likely to suffer future injury by the defendant and that the sought-after relief will prevent that future industry."

That is from Los Angeles, which I just quoted a moment ago. The James case, which I will identify as a Fifth Circuit case, 254 F3d 551, Fifth Circuit, 2001, came out two or three months ago. I'm sure counsel are familiar with it.

Then goes on to say with respect to this issue of standing, "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief."

And that seems to me to dominate the discussion and almost, if not totally, determine the issue before the court today.

In order to have standing--let me put it this way. For the court to have jurisdiction in the subject matter, there must be Article 3 standing. For the court to have standing those elements which I just recited must be satisfied. And that standing must be had by the plaintiff or plaintiffs who bring the case, not those who might otherwise be affected by the case. This is true in class action law, and it is true, I think, in other context I may not get into.

Give a further quote, "Plaintiffs must establish a likelihood of substantial and immediate irreparable injury." That's from Shea, S-h-e-a, versus Littleton, 414 U.S. 488, 1974 from the Supreme Court.

Now there is an argument to be made and has been very ably made, I might say, by Ms. Walker, that the proper standard for determining likelihood of success is reasonableness, and also that there need not be an on-going situation because the wrong that a plaintiff has suffered is a predictor of future wrongs which would justify an injunction.

I don't really agree with that as far as the, for instance, Friends of the Earth which appears to be relied on by the plaintiffs here. That is a case which involved on-going harm, not just a single episodic, so to speak, incident, but on-going harm.

In the Fifth Circuit, Bass versus Parkwood Hospital, 180 F3d 234, Fifth Circuit 1999, says, as to 2000(a), "Plaintiffs must be likely to again suffer from a defendant's discriminatory actions in order to prevail."

In a case involving a local environmental ordinance, Prestage, P-r-e-s-t-a-g-e, Farms versus Board of Supervisors, 205 F3d 265, Fifth Circuit 2000, it was stated that there must be in effect a real or immediate threat—in fact, I think that case says almost to a certainty that there will be future industry.

The James case to which I alluded a moment ago follows the same standard and relies heavily on Lions photograph.

Now Prestage Farms involved a local environmental ordinance, I understand that. The James case involved a variety--almost a variety, I would say, of civil rights alleged violations. But it invoked Lions, as had been done elsewhere, and seems to me the implication, so to speak, of Lions in 2000(a) is so well established that it would be fatuous for the court to ignore it.

Under the test of Lions as followed by the courts in 2000(a) and as followed in the Fifth Circuit, there simply is not Article 3 standing here. It was pointed out to the court just before plaintiff--in plaintiff's closing argument, the Glass Menagerie case and also Jackson versus Motel 6, the district court decision there. Both of those cases, what I've tried to do in the brief recess is check my memory on the matter. But both of those cases the district court level in Jackson and Glass Menagerie case, involved a specific customer policy which was on-going and as to which there was a specific injunction in Glass Menagerie, preliminary injunction which was entered. That is not the case here. There is no proof of an on-going policy so far as I can ascertain.

I've said the plaintiff lacks Article 7 standing because no injury, in fact, defined injury, in fact, or I quoted from the City of Los Angeles as defining injury in fact and also as set forth in the James case. I don't think—in fact I find that the plaintiffs have not met the requirements for an injury in fact already addressed to the situation. Requirement Article 3 standing that what's needed for injunctive relief, real or immediate threat, that the plaintiff would be wronged again. That simply has not happened here, and there is no showing other than the fact that one thing happened here, that it would happen again.

In fact, the facts really belie that situation. What I recall from testimony from the 1981 aspect here and again really from the argument here today, there have been no complaints about Cindy Smith before this happened. None by the plaintiffs here. Plaintiffs have been in the store prior to this time. No problem on-going there, so far as I recall.

As a matter of fact, subsequent to this incident, Mr. Govea was in the store, saw Cindy Smith and she gave him a smile, which he didn't like, but there was no showing of any harm there. He went to another store where she was employed, Conoco store. No harm or transgression on his rights there, so far as I can tell.

Asking you for identification is questionable whether it has anything to do with race but I don't need to get into that here.

Mr. Reese has described this as an isolated personal conflict. That's a point of view. It is not a determining point of view, as I think I have already mentioned, but there is something perhaps to support that since this was one incident with Cindy Smith is what's involved.

I must say, but it does not determine the court's decision here, it seems to me there should have been more discipline on Cindy Smith than was put on her, but that is a matter that has nothing to do with the court's holding.

So the cases I have cited support the court's ruling in my judgment that the plaintiff's do not have the required standing to sue for injunctive relief under 42 2000 (a).

And the relief which is sought here in my judgment would not prevent the future injury. There is no way a court can control some of the aspects. The court would be constantly in the business of controlling some of the aspects of relief which the plaintiffs seek here. There is no policy by the defendant involved. There is no policy saying discriminate, there is no policy saying, don't discriminate. I suppose that's as broad as

it is long. But what that does mean to me as where there is no policy involved, there is no standing, and any injury is conjectural as recited, which you can not have in order to have an injury in fact.

So for the reasons I have stated, perhaps inarticulately, but based on what I hope is a thorough review of all of the evidence and the cases and the arguments of counsel, the relief under 2000(a) will be denied. I will enter an order to that effect.

Counsel should confer. I've entered an order--I've entered the partial judgment with reference to the 1981 complaint, and there have been agreement of counsel 50(b) motion filed and deadline for responding to that.

So I will enter a final judgment when counsel suggest—I don't want to get a procedural mess on our hands here. I don't think anybody wants to. I would like to go ahead and take up very quickly the 50(b) motion and consider it as though a final judgment had been entered, and the light of that which is what's require understand 50(b).

So be glad to have counsel's suggestion as to how to handle that. Try to follow them. Let me have those just as soon as you can.

Again I appreciate the presentation. Court's in recess.

(End of proceedings, 4:00)

APPENDIX G

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

[Filed Jun 2, 2003]

No. 01-11549

DENISE ARGUELLO, ET AL.,
Plaintiffs,

DENISE ARGUELLO; ALBERTO GOVEA,
Plaintiffs-Appellants,

v.

CONOCO, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING EN BANC

(Opinion 5/5/03, 5 Cir., _____, _____F.3d _____)

Before SMITH, BARKSDALE, and EMILIO M. GARZA,
Circuit Judges.

PER CURIAM:

(√) Treating the Petition for Rehearing En Bane as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Bane (FED.R.APP. P and 5TH CIR.R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor ((FED.R.APP. P and 5TH CIR.R. 35), the Petition for Rehearing En Banc is DENIED.

/s/ [Illegible]
United States Circuit Judge

APPENDIX H

42 USC § 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment The rights protected by this section are protected against impairment by non-governmental discrimination and impairment under color of State law.

APPENDIX I

42 USC § 2000a. Prohibition against discrimination or segregation in places of public accommodation

(a) Equal access

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments

Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(c) Operations affecting commerce; criteria; "commerce" defined

The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

(d) Support by State action

Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

(e) Private establishments

The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section.

§§ 2000a-1. Prohibition against discrimination or segregation required by any law, statute, ordinance, regulation, rule or order of a State or State agency

All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

§§ 2000a-2. Prohibition against deprivation of, interference with, and punishment for exercising rights and privileges secured by section 2000a or 2000a-1 of this title

No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 2000a or 2000a-1 of this title, or (b) intimidate, threaten, or coerce, or attempt to

intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 2000a or 2000a-1 of this title, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 2000a or 2000a-1 of this title.

§§ 2000a-3. Civil actions for injunctive relief

(a) Persons aggrieved; intervention by Attorney General; legal representation; commencement of action without payment of fees, costs, or security

Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a-2 of this title, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

(b) Attorney's fees; liability of United States for costs

In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

(c) State or local enforcement proceedings; notification of State or local authority; stay of Federal proceedings

In the case of an alleged act or practice prohibited by this subchapter which occurs in a State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) of this section before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.

(d) References to Community Relations Service to obtain voluntary compliance; duration of reference; extension of period

In the case of an alleged act or practice prohibited by this subchapter which occurs in a State, or political subdivision of a State, which has no State or local law prohibiting such act or practice, a civil action may be brought under subsection (a) of this section: *Provided,* That the court may refer the matter to the Community Relations Service established by subchapter VIII of this chapter for as long as the court believes there is a reasonable possibility of obtaining voluntary compliance, but for not more than sixty days: *Provided further,* That upon expiration of such sixty-day period, the court may extend such period for an additional period, not to exceed a cumulative total of one hundred and twenty days, if it believes there then exists a reasonable possibility of securing voluntary compliance.

§ 2000a-4. Community Relations Service; investigations and hearings; executive session; release of testimony; duty to bring about voluntary settlements

The Service is authorized to make a full investigation of any complaint referred to it by the court under section 2000a-3(d) of this title and may hold such hearings with respect thereto as may be necessary. The Service shall conduct any hearings with respect to any such complaint in executive session, and shall not release any testimony given therein except by agreement of all parties involved in the complaint with the permission of the court, and the Service shall endeavor to bring about a voluntary settlement between the parties.

§ 2000a-5. Civil actions by the Attorney General

(a) Complaint

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) Three-judge district court for cases of general public importance: hearing, determination, expedition of action, review by Supreme Court; single judge district court: hearing, determination, expedition of action

In any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of the copy of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall

then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

§§ 2000a-6. Jurisdiction; exhaustion of other remedies; exclusiveness of remedies; assertion of rights based on other Federal or State laws and pursuit of remedies for enforcement of such rights

(a) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subchapter and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

(b) The remedies provided in this subchapter shall be the exclusive means of enforcing the rights based on this subchapter, but nothing in this subchapter shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this subchapter, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.

APPENDIX J

[Plaintiff's Ex. 3]

ACAPULCO FOOD DISTRIBUTORS

March 27, 1995

Denise Arguello
11332-B E. 19th St.
Tulsa, Oklahoma 74128
918 437-8706 Telephone
918 437-5421 Fax

Att: Gloria Huff,

I am requesting a copy of the Conoco policy regarding racial discrimination by Conoco employees against Conoco customers. I am demanding this information after my father and I were verbally attacked with racial slurs and obscenities. I was visiting my parents from Tulsa OK. on 3/26/95 we walked into the Fort Worth Conoco store #43103 and were confronted by Conoco Employee #013 at 15:55 in the afternoon Clerk #013 stated that she hated Mexicans and Iranians. The clerk called me a fucking Iranian Bitch in front of other customers and my father. When I tried to leave the store clerk #013 picked up a six pack of beer that was being purchased by the next customer in line and threw it at me, this physical attack was also witnessed by my husband who was walking into the store at the exact moment the clerk threw the beer at me. As my husband and I walked across the parking lot to our car Conoco clerk #013 started yelling obscenities and racial slurs at us over the gas pump intercom. The next morning I spoke to Deann the store manager about the incident she said she had no idea who was on duty that afternoon. I then contacted district manger Linda Corbin and informed her of the incident. Linda Corbin assured me that some discipline action would be taken but she could not tell me if this meant clerk #013 would be terminated.

An apology and some sort of disciplinary action is not good enough—this woman is out of control and is obviously a

threat to any minority customer that walks into a Conoco store. This woman should be at least terminated and prosecuted for her actions on 3/26/95 at Conoco store #43103. I have met with my lawyer and I am at the present time contemplating bringing a civil suit against Conoco for the discrimination my family and I endured on 3/26/95. I have also inlisted community support such as the Violence Intervention Organization and LULAC both of Ft. Worth Texas. I hope to get adequate response from Conoco within a week of receiving this letter.

Sincerely,

/s/ Denise Arguello
DENISE ARGUELLO

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed July 5, 2001]

Civil Action No. 3:97-0638-H

DENISE ARGUELLO and ALBERTO GOVEA,
Plaintiffs,

v.

CONOCO, INC.,
Defendant.

COURT'S CHARGE TO THE JURY

(*Prior to Argument*)

MEMBERS OF THE JURY:

Now that you have heard the evidence, it is my duty to instruct you on the law that is applicable to this case. I will instruct you regarding the law that you should apply in answering certain questions of fact in the case, and I will read to you those questions in a few moments.

The attorneys then will have the opportunity to make their closing arguments. You are instructed that the statements and arguments of counsel are not evidence. They are only intended to assist the jury in understanding the evidence and the contentions of the parties to this suit.

After the attorneys make their closing arguments, I will give you some additional instructions, after which you will retire to commence your deliberations.

In arriving at your verdict, it is your duty to follow the rules of law which I give to you and to find the facts of this case from the evidence introduced at trial and in accordance with these rules of law.

Throughout these instructions, I will refer to Denise Arguello and Alberto Govea as "Plaintiffs." I will refer to Conoco, Inc. as "Defendant" or "Conoco."

You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole.

You should not consider or be influenced by the fact that during the trial of this case, counsel have made objections to the testimony, as it is their duty to do so, and it is the duty of the Court to rule on those objections in accordance with the law. You are not bound by any opinion which you might think the Court has concerning the facts of this case. Further, nothing in these instructions to you is made for the purpose of suggesting to you what verdict I think you should find.

It is the function of the jury to determine the credibility of each witness and to determine the weight to be given the witness's testimony. Consider all of the circumstances under which the witness testified; the interest, if any, the witness has in the outcome of the case; the witness's appearance and demeanor while on the witness stand; the witness's apparent candor and fairness, or the lack thereof; the reasonableness or unreasonableness of the witness's testimony; and the extent to which the witness is contradicted or supported by other credible evidence. You will rely on your own good judgment and common sense in considering the evidence and determining the weight to be given it.

The testimony of a single witness, which produces in your minds the belief in the likelihood of truth, is sufficient for the proof of any fact, even though a greater number of witnesses may have testified to the contrary, if you believe this witness and have considered all the other evidence.

A witness may be discredited, or "impeached" by contradictory evidence, by a showing that he or she testified falsely concerning a material matter, or by evidence that at some other time the witness said or did something, or failed to say or do something, which is inconsistent with the present testimony of that witness. If you believe that any witness has been impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you think it deserves.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it because people may forget things or remember other things inaccurately. So, if a witness has made a misstatement, you need only consider whether that misstatement was an intentional falsehood or simply an innocent lapse of memory; the significance of that may depend on whether it has to do with an important factor or with only an unimportant detail.

Generally speaking, there are two types of evidence that a jury may consider in properly finding the truth as to the facts in the case. One is direct evidence-such as testimony of any eyewitness. The other is indirect or circumstantial evidence-the proof of a chain of circumstances which points to the existence or non-existence of certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence but simply requires that the jury find the facts from the evidence, both direct and circumstantial.

While you should consider only the evidence in the case, you are permitted to draw reasonable inferences and deductions from the evidence. The expression "to draw an inference" means to find that a fact exists based on proof of another fact. An inference may be drawn only if it is reasonable and logical, not if it is speculative. Therefore, in deciding whether to draw an inference, you must consider all the facts in the light of reason, common sense and experi-

ence. After you have done that, the question whether to draw a particular inference is for you to decide.

Deposition testimony is testimony which has previously been taken under oath. You are instructed that such testimony is entitled to be given the same weight you would give it if it were presented by a witness appearing in the courtroom during trial.

The parties have introduced into evidence certain interrogatories-that is, questions together with answers signed and sworn to by the other party. A party is bound by his or her sworn answers. By introducing an opposing party's answers to interrogatories, however, a party does not bind himself to these answers, and he may challenge them in whole or in part or may offer contrary evidence.

Any notes that you have taken during this trial are only aids to your memory. If your memory differs from your notes, you should rely on your memory and not on the notes. The notes are not evidence. If you have not taken notes, you should rely on your independent recollection and should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollection or impression of each juror about the testimony.

In this case, the Plaintiffs, Denise Arguello and Alberto Govea, must prove every essential part of their claim by a "preponderance of the evidence." A preponderance of the evidence means evidence that persuades you that a claim is more likely true than not true. In deciding whether any fact has been proved by a preponderance of the evidence, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced then.

Plaintiff's Contentions

Plaintiffs' claim arises from an incident that they allege occurred on March 26, 1995. Plaintiffs Denise Arguello and Alberto Govea assert that they stopped with other members of their family at a Conoco gas station to purchase gas and other items. They further assert that while they were in the store, Cindy Smith, the Conoco cashier working at the time, subjected them to racially discriminatory language and conduct. When Plaintiffs walked outside of the store, they contend that Cindy Smith continued her abusive treatment by broadcasting further racially derogatory language at them over the intercom system.

Plaintiffs assert that the incident occurred within the course and scope of Cindy Smith's employment with Conoco. They allege that her actions discriminated against them on account of their race. Additionally, Plaintiffs assert that even if Cindy Smith were not acting within the course and scope of her employment, Defendant Conoco ratified (that is, adopted) the actions of Cindy Smith.

Defendant's Contentions

Defendant Conoco contends that the Plaintiffs provoked the incident in question. Defendant claims that Cindy Smith did not discriminate against Plaintiffs and had no intent to discriminate against Plaintiffs.

Defendant asserts that Plaintiffs were not denied the right to make or enforce a contractual relationship with Conoco.

Defendant Conoco also asserts that it is not liable for Cindy Smith's actions because the incident did not occur within the course and scope of her employment, and that Conoco did not ratify Cindy Smith's actions.

Finally, Defendant Conoco denies that Plaintiffs suffered any damage.

Stipulated Facts

The parties have stipulated to, that is agreed to, the following ten facts:

1. Plaintiffs are of Mexican-American origin.
2. Conoco, Inc. is headquartered in Houston, Texas. Conoco has operations in Texas and throughout the world. Conoco's operations include, among other things, exploring for, producing, and selling crude oil, natural gas, and natural gas liquids; refining crude oil into petroleum products: buying and selling crude oil and refined products, and transporting, distributing, and marketing petroleum products. One way Conoco markets its petroleum products is to sell them to the general public through gas stations owned and operated by Conoco.
3. Plaintiffs were customers at a Conoco store on Randol Mill Road, in Fort Worth, Texas on March 26, 1995.
4. Cindy Smith was an employee of Conoco on March 26, 1995.
5. Phyllis Williams was an employee of Conoco on March 26,1995.
6. Linda Corbin was an employee of Conoco and was Direct Manager of Conoco's Randol Mill Store on March 26, 1995.
7. Neither Ms. Corbin nor the store manager was working in the Randol Mill store at the time of the incident on March 26, 1995.
8. Mrs. Arguello reported the incident to Conoco.
9. The Conoco store in question is a place of public accommodation.
10. The incident occurred while Cindy Smith was on duty as a cashier during her normal working hours.

INSTRUCTIONS AND QUESTIONS

42. U.S. C. § 1981

Plaintiffs' claim is based on alleged unlawful discrimination under 42 U.S.C.§ 1981("§ 1981") which provides:

> § 1981: Equal Rights Under Law
>
> (a) Statement of Equal Rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licences, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.
>
> (c) Protection against impairment
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

The purpose of this statute is to remove the impediment of discrimination from a minority citizen's ability to participate fully and equally in the marketplace.

To establish their claim under § 1981, Plaintiffs must show that 1) they are members of a racial minority; 2) Defendant intentionally discriminated against them on the basis of their race; and 3) the discrimination concerned the making, performing, modifying or terminating of a contract.

The parties agree that Plaintiffs were members of a racial minority.

The parties disagree, however, as to the other two elements. The parties disagree, and so you must determine, whether there was any intent by Cindy Smith to discriminate against Plaintiffs on the basis of their race. In order for her conduct to have been intentional, Cindy Smith's behavior toward Plaintiffs must have been racially motivated-that is, the purpose of her conduct must have been discriminatory.

The parties also disagree, and you must determine whether, even if discrimination occurred, that discrimination concerned the making and enforcing of a contract. A claim for interference with the right to make and enforce a contract must allege actual loss of a contract interest, not merely the possible loss of future contract opportunities. Accordingly, in order to prevail, Plaintiffs must show by a preponderance of the evidence that they sought to enter a contractual relationship with Defendant Conoco by purchasing gasoline and beer and that Cindy Smith intentionally denied them the opportunity to do so because of their race.

The parties have also agreed that Cindy Smith was an employee of Defendant Conoco. Defendant Conoco is subject to liability for the actions of its employee, Cindy Smith, if Plaintiffs have established that Cindy Smith was acting within the course and scope of her employment if she committed the alleged racially discriminatory acts against Plaintiffs Arguello and Govea.

An employee is acting within the scope of her employment when the acts done are so closely connected with what the employee is employed to do, and so fairly and reasonably incidental to it, that the acts may be regarded as methods, even though improper ones, of carrying out the objectives of

the employment. The factors you may use when considering whether Cindy Smith's acts were within the scope of her employment include:

1) the time, place, and purpose of the act;

2) its similarity to acts which the employee is authorized to perform;

3) whether the act is commonly performed by employees;

4) the extent of departure from normal methods;

5) the previous relations between the parties; and

6) whether the employer would reasonably expect that such acts would be performed.

Not all of these factors need to be present to find that Cindy Smith's actions were within the scope of her employment by Conoco. You may conclude that the absence of one or more of the factors is outweighed by the presence of other factors.

Defendant Conoco may also be found liable if Plaintiffs have proved that it ratified (that is, approved) Cindy Smith's actions. In order for an employer to be found to have ratified the actions of an employee, the employer must know of the act and adopt, confirm, or fail to repudiate the acts of the employee, after the acts were committed.

Question 1

Did Plaintiffs prove by the preponderance of the evidence that Cindy Smith discriminated against Plaintiff Denise Arguello in violation of § 1981?

On this question, Plaintiffs have the burden of proof.

Check only one answer:

X Yes, Plaintiffs did so prove.

__ No, Plaintiffs did not so prove.

Proceed to the next question.

Question 2

Did Plaintiffs prove by the preponderance of the evidence that Cindy Smith discriminated against Plaintiff Alberto Govea in violation of § 1981?

On this question, Plaintiffs have the burden of proof.

Check only one answer:

X Yes, Plaintiffs did so prove.

___ No, Plaintiffs did not so prove.

If you answered "No" to both *Question 1* and *Question 2*. proceed to page 23.

If you answered "Yes" *to Question 1* and/or *Question 2*, proceed to the next page.

Question 3

Did Plaintiffs prove by the preponderance of the evidence that Cindy Smith was acting in the course and scope of her employment with regard to her conduct toward Plaintiff Denise Arguello?

On this question, Plaintiffs have the burden of proof.

If you answered "No" to *Question 1*, skip this question and proceed to the next page.

Check only one answer:

X Yes, Plaintiffs did so prove.

___ No, Plaintiffs did not so prove.

Proceed to the next question.

Question 4

Did Plaintiffs prove by the preponderance of the evidence that Cindy Smith was acting in the course and scope of her employment with regard to her conduct toward Plaintiff Alberto Govea?

On this question, Plaintiffs have the burden of proof.

If you answered "No" to *Question 2,* skip this question and proceed to the next page.

Check only one answer:

X Yes, Plaintiffs did so prove.

___ No, Plaintiffs did not so prove.

If you answered "Yes" to both *Question 3* and *Question 4,* proceed to page 17.

If you answered "No" to *Question 3* and/or *Question 4,* proceed to the next page.

Question 5

Did Plaintiffs prove by the preponderance of the evidence that Defendant Conoco ratified the behavior of Cindy Smith toward Plaintiff Denise Arguello?

On this question, Plaintiffs have the burden of proof.

If you answered "No" to *Question 1* or "Yes" to *Question 3,* skip this question and proceed to the next page.

Check only one answer:

___ Yes, Plaintiffs did so prove.

___ No, Plaintiffs did not so prove.

Proceed to the next page.

Question 6

Did Plaintiffs prove by the preponderance of the evidence that Defendant Conoco ratified the behavior of Cindy Smith toward Plaintiff Alberto Govea?

On this question, Plaintiffs have the burden of proof.

If you answered "No" to *Question 2,* or "Yes" to *Question 4* skip this question and proceed to the next page.

Check only one answer:

___ Yes, Plaintiffs did so prove.

___ No, Plaintiffs did not so prove.

If you answered "Yes" to *Question 1* or *Question 2*, but "No" to the remaining questions (*Question 3, Question 4, Question 5*, and *Question 6*), proceed to page 23. Otherwise, proceed to the next page.

COMPENSATORY DAMAGES

If the Plaintiffs have proved a claim against the Defendant by a preponderance of the evidence, you must then determine the damages to which the Plaintiffs are entitled. You should not interpret the fact that I have given instructions about the Plaintiffs damages as an indication that I believe that the Plaintiffs should, or should not, receive damages. It is your task first to decide if the Defendant is liable. I am instructing you on damages only so that you will have guidance in the event you decide that the Defendant is liable and that a Plaintiff is entitled to recover money from the Defendant.

You may award compensatory damages, based on the evidence introduced at trial, for any future pecuniary losses, emotional pain and suffering, inconvenience, and mental anguish.

In considering damages, if any, you are instructed that you should assess the amount you find to be justified by a

preponderance of the evidence as full, just and reasonable compensation for Plaintiffs damages caused by Defendants. Unless I instruct you otherwise, damages are not allowed as a punishment, and cannot be imposed or increased to penalize the Defendant. Neither can damages be based on speculation. That is to say, you are not permitted to include in your assessment compensation for damages which, although possible, are remote or conjectural. Compensatory damage can be awarded only for those harms which the Plaintiff has actually suffered or that Plaintiff is reasonably likely to suffer in the future as a consequence of Defendant's intentional discrimination against Plaintiffs.

In determining the amount of any damages you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation and guesswork. On the other hand, the law does not require that Plaintiffs prove the amount of their damages with mathematical precision, but only with as much definitiveness and accuracy as circumstances permit.

Question 7

If you answered "Yes" to *Question 3 or Question 5*, please answer the following question:

What amount of money, if any, do you find from a preponderance of the evidence that Plaintiffs have proved would fairly and reasonably compensate Plaintiff Denise Arguello for her damages, if any?

Answer in dollars and cents, if any, or "None."

Answer: $50,000.00

Question 8

If you answered "Yes" to *Question 4* or *Question 6*, please answer the following question:

What amount of money, if any, do you find from a preponderance of the evidence that Plaintiffs have proved would fairly and reasonably compensate Plaintiff Alberto Govea for his damages, if any?

Answer in dollars and cents, if any, or "None."

Answer: $25,000.00

PUNITIVE DAMAGES

If you find that the Defendant is liable for the Plaintiffs' injuries, you must award the Plaintiff the compensatory damages that he has proved. You also may award punitive damages if the Plaintiff has proved that the Defendant engaged in discriminatory practice with malice or with reckless indifference to the rights of Plaintiffs Arguello and Govea to be free from such discrimination.

The purpose of an award of punitive damages is, first, to punish a wrongdoer for misconduct, and second, to warn others against doing the same.

The law does not require you to award punitive damages; however, if you decide to award punitive damages, you must use sound reason in setting the amount of the damages. The amount of an award of punitive damages must not reflect bias, prejudice, or sympathy toward any party. However, the amount can be as large as you believe necessary to fulfill the purposes of punitive damages. You may consider the financial resources of the defendant in fixing the amount of punitive damages.

Question 9

If you answered "Yes" to *Question 3* or *Question 5*, please answer the following questions:

a) Did the Plaintiff prove by a preponderance of the evidence that punitive damages should be awarded to Plaintiff Denise Arguello?

Answer "Yes" or "No"

Answer: Yes

b) If you answered, "Yes," what amount, if any, do you find should be awarded to Plaintiff Denise Arguello as punitive damages?

Answer in dollars and cents, if any, or "None."

Answer: $500,000.00

Proceed to the next question.

Question 10

If you answered "yes" to *Question 4* or *Question 6*, please answer the following questions:

a) Did the Plaintiff prove by a preponderance of the evidence that punitive damages should be awarded to Plaintiff Alberto Govea?

Answer "Yes" or "No"

Answer: Yes

b) If you answered, "Yes," what amount, if any, do you find should be awarded to Plaintiff Alberto Govea as punitive damages?

Answer in dollars and cents, if any, or "None."

Answer: $250,000.00

62a

COURT'S CHARGE TO THE JURY

(After Argument)

MEMBERS OF THE JURY

You are the sole and exclusive judges of the facts. You should determine these facts without any bias, prejudice, sympathy, fear, or favor, and this determination should be made from a fair consideration of all the evidence that you have seen and heard in this trial. Do not speculate on matters which are not in evidence. Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case.

Your answers and verdict must be unanimous; that is, all of you must agree to each of your answers. You will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences.

It is your duty as jurors to consult with one another and to deliberate in an effort to reach agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But, do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You will now retire to the jury room. In a few minutes I will send to you this charge and the exhibits which the Court has admitted into evidence. After you receive the charge and exhibits from the Court, you should select your foreperson and commence your deliberations. A transcript of the testimony will not be available for your deliberation.

If during the course of your deliberations you wish to communicate with the Court, you should do so only in writing by a note signed by the foreperson. I will then respond as promptly as possible, either in writing or by having you red to the courtroom so that I can address you orally. I caution you, however, with respect to any message or question you might send, that you should never state or specify your numerical division at the time.

During your deliberations you will set your own work schedule, deciding for yourselves when and how frequently you wish to recess and for how long.

After you have reached your verdict, you will return this charge together with your written answers to the foregoing questions. Do not reveal your answers until such time as you are discharged, unless otherwise directed by me. Your foreperson will sign in the space provided below after you have reached your verdict.

You should not elect your presiding juror and commence your deliberation until I have sent in to you the exhibits and this charge, which I will do in a few moments.

DATED: July 5, 2001.

/s/ Barefoot Sanders
BAREFOOT SANDERS, SENIOR JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

VERDICT OF THE JURY

We, the jury, have answered the above and foregoing questions as indicated, and herewith return the same into Court as our verdict.

/s/ Kelly Richey
KELLY RICHEY
Foreperson

Dated: 7/05/01

Supreme Court, U.S.
FILED
OCT 15 2003
OFFICE OF THE CLERK

No. 03-342

IN THE

Supreme Court of the United States

DENISE ARGUELLO and ALBERTO GOVEA,

Petitioners,

v.

CONOCOPHILLIPS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent ConocoPhillips, formerly known as Conoco, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock. It is publicly traded on the NYSE.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iii
Counter-Statement of the Case	1
Reasons for Denying the Petition	3
I. The Decision Below Does Not Present A Conflict	3
II. The Decision Below Was Correct	5
III. The Fifth Circuit Correctly Applied Section 2000a	7
Conclusion	9

TABLE OF CITED AUTHORITIES

Page

Cases:

Bagley v. Ameritech Corp., 220 F.3d 518 (7th Cir. 2001) 3

Christian v. Wal-Mart Stores, Inc., 252 F.3d 862 (6th Cir. 2001) 3, 4

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 7, 8

Garrett v. Tandy Corp., 295 F.3d 94 (1st Cir. 2002) 3, 4, 5

Griffith v. State of Colorado Division of Youth Services, 17 F.3d 1323 (10th Cir. 1994) 8

Hampton v. Dillard Department Stores, Inc., 247 F.3d 1091 (10th Cir. 2001) 3, 5, 6

Hill v. Shell Oil Co., 78 F. Supp. 2d 764 (N.D. Ill. 1999) 8

Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999 (11th Cir. 1997) 8

James v. City of Dallas, 254 F.3d 551 (5th Cir. 2001, *cert. denied*, 122 S. Ct. 919 (2002)) 8

LaRoche v. Denny's, Inc., 62 F. Supp. 2d 1366 (S.D. Fla. 1999) 8

Cited Authorities

Page

Lizardo v. Denny's, Inc., 2000 WL 976808 (N.D. N.Y. 2000) 8

Morris v. Dillard Dept. Stores, Inc., 277 F.3d 743 (5th Cir. 2001) 4, 5

Morris v. Office Max, Inc., 89 F.3d 411 (7th Cir. 1996) 6

O'shea v. Littleton, 414 U.S. 488 (1974) 8

Rogers v. Elliott, 135 F. Supp. 2d 1312 (N.D. Ga. 2001) 6

Spencer v. General Electric Co., 894 F.2d 651 (4th Cir. 1990) 8

United States v. W.T. Grant Co., 345 U.S. 629 (1953) 8

Youngblood v. Hi-Vee Food Stores, Inc., 266 F.3d 851 (8th Cir. 2001), *cert. denied*, __ U.S. __, 122 S. Ct. 1606, 152 L. Ed. 2d 621 (2002) 4, 5, 6

Statutes:

42 U.S.C. § 1981 ..... 3, 4, 5, 6, 9

42 U.S.C. § 1981(a) 5

42 U.S.C. § 2000a 7, 8, 9

Respondent ConocoPhillips ("Conoco") requests that this Court deny the Petition for Certiorari ("Pet.") filed by Denise Arguello and Alberto Govea, seeking a review of the decision of the United States Court of Appeals for the Fifth Circuit entered in this case on May 5, 2003.

COUNTER-STATEMENT OF THE CASE

Petitioner's recitation of the background facts of this case are laced with exaggeration and hyperbole. On March 26, 1995, Denise Arguello (sometimes referred to as "Arguello" or "Petitioner") and Alberto Govea (sometimes referred to as "Govea" or "Petitioner") stopped at a Conoco store in Fort Worth, Texas to purchase gasoline and beer. Arguello, after pumping her gas, went into the store to pay for the gas and to buy some beer (Pet. App. D at 16a). Cindy Smith, the clerk on duty, requested identification from Arguello for age confirmation and because she was paying with a credit card (Pet. App. D at 16a). After initially stating that she would not accept Arguello's out-of-state driver's license, Smith relented and rang up Arguello's purchases. (Pet. App. D at 16a).

During Arguello and Smith's discussion, but prior to any comments in any way referencing race or national origin, Govea, who was standing behind Arguello waiting to purchase his own beer, grew frustrated, left the beer he had intended to purchase on the counter, and left the store. (Pet. App. D at 16a). At this time, no racial slurs or remarks had been made. After Govea left the store, and after Arguello completed her purchases, the tension between Arguello and Smith escalated. (Pet. App. D at 17a). Nevertheless, Arguello testified at trial that Smith did not prevent her from purchasing her gas and beer, and that the only hindrance she

encountered in making her purchase was Smith's request for identification. (22 R. 128)[1]

As she was leaving the store, Arguello told Smith that she did not have to take it out on her if she did not like her job. (Pet. at 5). Arguello alleges Smith then referred to her as a "f_ _ _ ing Iranian Mexican bitch". (Pet. App. D at 17a). Arguello also alleges that, after she left the store, Smith began screaming racist remarks over the store's intercom. (Pet. App. D at 17a). At that point, Govea telephoned Conoco from a pay phone outside the store to lodge a complaint against Smith. (Pet. App. D at 17a).

Contrary to Petitioners' assertions, they were not prevented from purchasing the items they tried to purchase. (Pet. App. D at 21a-22a). Nor did Smith's conduct prevent Arguello from purchasing Govea's beer. (Pet. App. D at 21-22a). Likewise, contrary to Petitioner's implications (Pet. at 7-8), there was no record evidence that Conoco had some type of corporate policy allowing race discrimination against customers. Also contrary to Petitioners' recitation of the facts, (Pet. at 8), Smith in fact was warned in writing about her conduct. (23 R. 7).

---

1. Arguello testified as follows:

Q. So she was not trying to prevent you from buying the beer at that point?

A. No.

Q. And even though she asked for a credit card and driver's license, she still completed the sale for you?

A. Yes.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW DOES NOT PRESENT A CONFLICT

The two cases that Petitioners assert are contrary to the Fifth Circuit's decision are *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862 (6th Cir. 2001) and *Garrett v. Tandy Corp.*, 295 F.3d 94 (1st Cir. 2002). To the contrary, the holdings and legal pronouncements in *Christian* and *Garrett* are entirely consistent with that of the Fifth Circuit in this case, and there is absolutely no split among the Circuits as to the application of § 1981 in the consumer context so as to justify Supreme Court review. *Id.* at 1118. Accordingly, far from suggesting a split among circuits, the *Hampton* court acknowledged its adherence to the precise line of authority relied on by the Fifth Circuit here.

While the Section 1981 consumer plaintiffs prevailed in *Christian*, the result turned entirely on the facts of the case, not on any interpretation of Section 1981. While the court in *Christian* devoted considerable attention to discussion of the proper showing for a *prima facie* case of discrimination in a § 1981 consumer case, there also was no issue as to the deprivation of a right protected by § 1981 that conflicts with the Fifth Circuit opinion in this case. The plaintiffs were escorted from the store *prior* to completing their purchases. Indeed, the case turned more on the sufficiency of the evidence of discriminatory intent than on whether there was an actual deprivation with a contractual interest. As the court observed, "[t]his case involves none of the difficulties that other courts have encountered in determining whether there was a valid contract interest at stake." *Christian*, 252 F.3d at 874, *citing Bagley v. Ameritech Corp.*, 220 F.3d 518 (7th Cir. 2001).

Petitioners focus on the *Christian* court's fashioning of a *prima facie* test as including proof that the plaintiff was either deprived of services or received services ". . . in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory." *Id.* at 872. The *Christian* court, however, consistent with the facts in the case, emphasized that the standard ". . . better comprehends the realities of commercial establishment cases in which an aggrieved plaintiff may have been asked to leave the place of business prior to completing her purchase, refused service within the establishment, or refused outright access to the establishment." *Id.* at 873. This present case contains no record evidence of any such deprivation or refusal of service. Accordingly, the plaintiffs in *Christian* were allowed to proceed with their § 1981 claims because they were ejected from the store and not allowed to complete their purchases. Petitioners here have no such evidence and *Christian* does not conflict with the Fifth Circuit's opinion.

Petitioners also contend that *Garrett v. Tandy Corp.*, 295 F.3d 94 (1st Cir. 2002), is contrary to the Fifth Circuit's decision. As in *Christian*, the *Garrett* court relied on precisely the same precedent cited in a Fifth Circuit decision in this case.[2] While the *Garrett* court took issue somewhat with the outcomes of the cases, it held squarely that the courts had utilized the proper legal standard and emphasized that "Congress did not intend to convert Section 1981 into a general prohibition against race discrimination."

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2. In particular, the *Garrett* court relied on the Fifth Circuit's prior decision in *Morris v. Dillard Dept. Stores, Inc.*, 277 F.3d 743 (5th Cir. 2001) and *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851 (8th Cir. 2001), *cert. denied*, 122 S. Ct. 1606 (2002). Petitioners wrongly assert that both of these cases are contrary to *Garrett* and *Christian*.

Garrett, 295 F.3d at 100. The court further held, consistent with *Youngblood* and the Fifth Circuit cases that, in order to bring a § 1981 claim, a retail customer must actually show he or she was actually denied the right to make, perform, enforce, modify or terminate a contract because of racial discrimination. *Id.* at 295-96. Accordingly, *Garrett* is entirely consistent with the Fifth Circuit's decision here.

II. THE DECISION BELOW WAS CORRECT

As the Fifth Circuit correctly stated, § 1981 does not provide a general cause of action for race discrimination. Section 1981 protects an individual's ability "to make and enforce contracts" on non-discriminatory terms. 42 U.S.C. § 1981(a). The federal courts have consistently held that, to establish a depravation of § 1981 rights in a retail context, a plaintiff must demonstrate "the loss of an actual, not speculative or prospective, contract interest". *See, e.g., Morris v. Dillard Department Stores, Inc.*, 277 F.3d 743, 751 (5th Cir. 2001).

Indeed, every federal Section 1981 case in the retail context, has held in one form or another that "there must have been interference with a contract beyond the mere expectation of being treated without discrimination while shopping." *Hampton v. Dillard Department Stores, Inc.*, 247 F.3d 1091, 1118 (10th Cir. 2001); *see also Garrett v. Tandy Corp.*, 295 F.3d 94, 100 (1st Cir. 2002) ("a retail customer must show that he was *actually* denied the ability either to make, perform, enforce, modify or terminate a contract by reason of a race-based animus") (emphasis added); *Youngblood v. Hi-Vee Food Stores, Inc.*, 266 F.3d 851, 854 (8th Cir. 2001), *cert. denied*, __ U.S. __, 122 S. Ct. 1606, 152 L. Ed. 2d 621 (2002) (a customer could not bring a claim against the store under Section 1981 because once the customer paid the cashier and received the purchase from

the cashier, neither party owed the other any duty under the retail sale contract); *Morris v. Office Max, Inc.*, 89 F.3d 411 (7th Cir. 1996) (to establish a 1981 claim, a customer must show he or she is engaged in an actual attempt to contract that was thwarted by the merchant). A plethora of district court cases have come to the same conclusion. (*See, e.g.*, *Rogers v. Elliott*, 135 F. Supp. 2d 1312, 1315 (N.D. Ga. 2001) and the cases cited therein.)

This court has already denied *certiorari* in the *Hampton* and *Youngblood* decisions. What the Petitioners are requesting this Court to do is overturn 15 years of consistent federal law, as well as the plain language of § 1981, and instead adopt an ill-defined, expansive concept of "making a contract" that would include far more than the purchase and receipt of goods and services and would turn Section 1981 into a general prohibition against racial discrimination. To do so would transform § 1981 into a general cause of action for race discrimination in all contexts in contravention of the plain language of the statute and congressional intent. The Fifth Circuit correctly declined to do so and correctly found that Arguello's § 1981 claim must fail as a matter of law because the evidence was undisputed that Arguello successfully completed her transaction and therefore cannot demonstrate any loss recoverable under § 1981.

The Fifth Circuit also correctly found that Govea's § 1981 claim must fail because he never attempted to enter into a contractual relationship with Conoco. While Govea was standing in line behind Arguello to purchase beer, Govea independently chose to leave his beer on the counter and leave the store without attempting to purchase the beer. While Govea did not purchase the beer, the evidence is undisputed

and uncontradicted that Smith did not prevent him from doing so. According to Govea's own testimony, he voluntarily set the beer on the counter and left without attempting to buy it.[3] Significantly, Govea left the store *before* the confrontation between Arguello and Smith escalated and Smith allegedly used racially derogatory language. (22 R. 131).

The Fifth Circuit's decision correctly states the applicable rule of law and faithfully applies that rule to the facts in the case. This decision does not so depart from the accepted and usual course of judicial proceedings as to call for an exercise of this court's supervisory power.

III. THE FIFTH CIRCUIT CORRECTLY APPLIED SECTION 2000a

The Fifth Circuit correctly held that Arguello and Govea were not entitled to injunctive relief without a showing that they were likely to suffer future injury by Conoco. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). The Court correctly held that a single altercation with a former Conoco employee that occurred over five years before the trial could not support the requirement that Petitioners were subject to an imminent threat of harm and that they would

---

3. Q. And what did you do . . .

A. I said let's just get out of here, I mean it's not worth it.

Q. Okay. But Ms. Smith didn't stop you from making that purchase, you decided that, didn't you?

A. That's correct.

(22 R. 116-117).

likely suffer a future injury at the hands of Conoco. To the contrary, Govea voluntarily went into another Conoco store after this incident where Smith worked without incident. (Pet. App. F at 32a).

While Petitioners argue that this court's decision in *City of Los Angeles v. Lyons* should not apply to Section 2000a claims, a likelihood of substantial and immediate irreparable injury has long been a general requirement in all injunction cases. *See United States v. W.T. Grant Co.*, 345 U.S. 629 (1953); *O'shea v. Littleton*, 414 U.S. 488 (1974). The purpose of injunctive relief is to prevent future harm. *United States v. W.T. Grant Co.*, 345 U.S. 649 (1953). If there is no real and immediate threat of future harm, no injunction will stand under any statutory scheme. *See, e.g., Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1007 (11th Cir. 1997).

The well-established rule that a real and substantial likelihood of future harm must be shown before injunctive relief is proper has been applied not only to 2000a claims but many other types of civil rights claims as well. *See Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1007 (11th Cir. 1997) (applied to Section 2000a claim); *Hill v. Shell Oil Co.*, 78 F. Supp. 2d 764, 779 (N.D. Ill. 1999) (applied to Section 2000a claim); *LaRoche v. Denny's, Inc.*, 62 F. Supp. 2d 1366 (S.D. Fla. 1999) (applied to Section 2000a claim); *Lizardo v. Denny's, Inc.*, 2000 WL 976808 (N.D. N.Y. 2000) (applied to Section 2000a claim); *James v. City of Dallas*, 254 F.3d 551 (5th Cir. 2001, *cert. denied*, 122 S. Ct. 919 (2002)) (applied to multiple civil rights statutes dealing with racial discrimination in housing); *Griffith v. State of Colorado Division of Youth Services*, 17 F.3d 1323 (10th Cir. 1994) (applied to Section 2000e claim); *Spencer v. General Electric Co.*, 894 F.2d 651, 660-61 (4th Cir. 1990) (applied to Title VII claim).

Arguello and Govea presented no evidence that there was any likelihood of future discriminatory treatment by Conoco. Indeed, the complained of employee, Cindy Smith, left Conoco years before Petitioners requested injunctive relief. A single instance of discriminatory conduct by a long since departed employee provides scant motivation or authority to radically modify fifty years of law as to the proper standard for injunctive relief.

CONCLUSION

After considering the relevant facts and the applicable law, the Fifth Circuit properly held the Petitioners could not prevail under § 1981 and were not entitled to injunctive relief under Section 2000a. In doing so, it applied settled and rational principles of law established by this Court as well as other courts of appeals. This decision is not, as Petitioners suggest, an aberration that will send the civil rights world spinning off its axis. Rather, it is the proper application of sound and rational principles of civil rights law based on a full and fair consideration of the facts. This case raises no significant issues that warrant this Court's review and the Petition of *Certiorari* should be denied.

Respectfully submitted,

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No. 03-342

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IN THE

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v.

CONOCO, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PURPOSE OF REPLY BRIEF

Arguello and Govea file this Reply Brief to alert the Court to a key misstatement of fact in Respondent's Brief in Opposition so that the Court decides the pending Petition for Writ of Certiorari based on the true facts of this case.

In its Brief in Opposition, Conoco states: "Smith in fact was warned in writing about her conduct." (Brief in Opp., p. 2) (citing 23R7). This is false.

Smith testified:

Q: You were never told by Conoco that you were being disciplined for this incident; is that correct?

A: Disciplined how? There was not a written . . .

Q: Answer my question. You were never told by anyone from Conoco that you were being disciplined for this incident; is that correct?

A: Correct.

Q: And you never signed any sort of disciplinary form or a counseling form for Conoco with regards to this incident; isn't that correct?

A: To my knowledge, correct.

(22R42, lines 6-16).

Conoco's citation to the record (23R7) does not support its misstatement of fact. The page Conoco cites actually contradicts Conoco's statement to the Court. It shows that if Smith had been given a written warning, any warning would have been contained in her personnel file. Gloria Huff, Conoco's Senior Advisor of Human Resources, testified that:

Q: Did you ever confirm whether or not Cindy Smith was reprimanded?

A: No, I didn't.

Q: If she was reprimanded is that something that you would expect to find in Cindy Smith's personnel file?

A: Yes, if it was written.

Q: Is Cindy Smith still an employee of Conoco?

A: I don't believe she is.

Q: If Cindy Smith received a written counseling form would you expect to find that in Cindy Smith's personnel file?

A: That is where it should be placed.

(23R7, lines 6-17). There are no other references whatsoever on that page of testimony concerning reprimands, warnings, or any discipline for Smith. Smith's personnel file contains

no written warning or other type of discipline for the incident. (Plaintiffs' Exhibit 8).

CONCLUSION

The true facts of this case reveal a racially motivated attack against Arguello and Govea during the course of their attempts to purchase goods. This attack prevented them from making the purchases they attempted to make. Conoco knew of this attack, failed to discipline the store clerk in any way, failed to reply to Arguello's complaint letter, and never instituted a policy against racial abuse of customers.

Certiorari should be granted on both questions included in the Petition. First, the circuit courts are split on whether the store clerk's conduct in these circumstances is actionable under 42 U.S.C. § 1981. Second, the case involves extraordinarily important questions concerning race discrimination that should be settled by the Court. This decision literally affects millions of people nationwide.

Respectfully submitted,

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MOTION FILED
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No. 03-342

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MOTION FOR LEAVE TO FILE AND BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE FILE BRIEF *AMICUS CURIAE*

Pursuant to this Court's Rules 33.1 and 37.2(b), your *amici* hereby seek leave of court to file the enclosed Brief for the National Association for the Advancement of Colored People As Amicus Curiae in Support of Petitioners (hereinafter "brief").

Petitioners, Denise Arguello and Alberto Govea, consent to the filing of the attached amicus brief while Respondent, Conoco, Inc., is opposed. A representative of the NAACP Legal Department contacted Paulo McKeeby of Littler Mendelson, P.C. to inquire about whether Respondent opposed the filing of the present amicus curiae brief on September 29, 2003. Mr. McKeeby returned the call the same day and informed the NAACP representative that Conoco, Inc. was opposed to the filing of any amicus brief in support of the Petitioners.

The NAACP hereby incorporates by reference the Interest of Amici Curiae as if fully set forth herein. Moreover, the NAACP notes that it has pending Title II cases. *See e.g. NAACP Conway Branch, et al. v. Shawnee Development Inc., et al.*, No. 4-03-1733-12 (D.S.C. filed May 20, 2003); *NAACP v. Cracker Barrel Old Country Store, Inc.*, No. 4:01-CV-325-HLM (N.D. Ga. filed Apr. 11, 2002). Therefore, the NAACP is constrained by both its conscience and practical considerations to seek this Court's leave to file an amicus brief in this matter.

Respectfully submitted,

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October 6, 2003

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
FACTUAL BACKGROUND	3
SUMMARY OF ARGUMENT	5
ARGUMENT	6
A. The Arguello Decision Establishes A Tortured And Erroneous Interpretation Of Standing Under Title II	7
B. *Arguello* Conflicts With The Plain Language And Legislative Intent Of Title II	12
CONCLUSION	16

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Arguello v. Conoco, Inc., 330 F.3d 355 (5th Cir. 2003) 5, 14
Ass'n For Retarded Citizens v. Dallas County Mental Health & Mental Retardation Ctr. Bd. Of Trustees, 19 F.3d 241 (5th Cir. 1994) 11, 12
Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999) 9
Desert Palace, Inc. v. Costa, ___ U.S. ___, 123 S.Ct. 2148 (2003) 17
Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp., 28 F.3d 1268 (D.C. Cir. 1994) 11
Fair Housing Counsel v. Montgomery Newspapers, 141 F.3d 71 (3rd Cir. 1998) 11
Grutter v. Bollinger, ___ U.S. ___, 123 S.Ct. 2325 (2003) 16, 17
Hamm v. City of Rock Hill, 379 U.S. 306 (1964) 6, 11, 14
Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968) 7, 8
Heart of Atlanta, 379 U.S. 241 (1964) 6, 12, 14, 16
Johnson v. Railway Express Agency, 421 U.S. 454 (1975) 14
Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 14
Katzenbach v. McClung, 379 U.S. 294 (1964) 6, 9, 10, 13, 14
Kolstad v. American Dental Assoc'n, 527 U.S. 526 (1999) 17
Linda R.S. v. Richard D., 410 U.S. 614 (1973) 8
Los Angeles v. Lyons, 461 U.S. 95 (1983) 7, 10

TABLE OF AUTHORITIES—Continued

Page

N.A.A.C.P. v. N.A.A.C.P. Legal Defense & Educational Fund, Inc., 753 F.2d 131 (D.C. Cir.), *cert denied* 472 U.S. 1021 (1985) 7

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 8, 10

O'Shea v. Littleton, 414 U.S. 488 (1974) 7, 8, 11

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, (2000) 17

Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) 14

Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) 7

United States v. Dickerson, 530 U.S. 428 (2000) .. 17

United States v. Johnson, 390 U.S. 563 (1968) 14, 15

Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515 (1937) 8, 9

FEDERAL STATUTES

42 U.S.C. § 1981 ..... 5, 14, 17

42 U.S.C. § 1983 ..... 10, 11

42 U.S.C. § 2000a 5, 12

42 U.S.C. § 1985 11

OTHER AUTHORITIES

Anne-Marie G. Harris, Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling, 23 B.C. Third World L.J. 1, 22 (2003) 15

IN THE

Supreme Court of the United States

No. 03-342

DENISE ARGUELLO and ALBERTO GOVEA,
Petitioners,

v.

CONOCO, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST[1]

The National Association for the Advancement of Colored People ("NAACP") is a non-profit membership corporation, chartered by the State of New York, tracing its roots to 1909. The NAACP has in excess of 500,000 members and over 2,200 units in the United States and overseas. As the nation's oldest and largest civil rights organization, its principal

[1] This brief is filed with the consent of the Petitioners. A Motion for Leave of Court to File Amicus Curiae Brief is included herewith to address Conoco, Inc.'s lack of consent. No counsel for a party authored this brief in whole or part, and no person or entity other than the NAACP made a monetary contribution to the preparation or submission of this brief.

aims and objectives are clearly set forth in its Constitution as follows:

> To insure the political, educational, social and economic equality of minority group citizens; to achieve equality of rights and eliminate race prejudice among the citizens of the United States; to remove all barriers of racial discrimination through democratic processes; *to seek enactment and enforcement of federal, state and local laws securing civil rights*; to inform the public of the adverse effects of racial discrimination and to seek its elimination; to educate persons as to their constitutional rights and *to take all lawful action to secure the exercise thereof, and, to take any other lawful action in furtherance of these objectives* consistent with the Articles of Incorporation.

CONSTITUTION OF THE NAACP (Blue Book) Article II Statement of Objectives (emphasis added).

The NAACP has used the legislature and the courts, among others, as primary instruments in its struggle to make real the rights that the Constitution provides for those within the borders of the United States. Reflecting on the important role that Title II of the Civil Rights Act of 1964 has played in its struggle to create a society where people of any race can shop, seek refuge, or convalesce in any venue that is open to the public, the NAACP takes seriously its role in protecting these interests.

In the public accommodations sphere, the NAACP has litigated significant cases in the more distant past and continues to do so in the present. *See e.g. NAACP Conway Branch, et al. v. Shawnee Development Inc., et al.*, No. 4-03-1733-12 (D.S.C. filed May 20, 2003); *NAACP v. Cracker Barrel Old Country Store, Inc.*, No. 4:01-CV-325-HLM (N.D. Ga. filed Apr. 11, 2002); *Gilliam v. HBE Corporation*, No. 99-596-CIV-ORL-22C (M.D. Fla. filed May 1999).

FACTUAL BACKGROUND[2]

Petitioners Denise Arguello (hereinafter "Arguello") and her father, Alberto Govea (hereinafter "Govea") are Hispanic.

On Saturday, March 26, 1995, Arguello and Govea stopped at a Conoco store in Fort Worth, Texas to purchase gas and other items on their way to what would otherwise be a quiet, enjoyable family picnic. Arguello went inside the store to pay for the gas and to purchase beer. Govea also entered the store to buy beer. Arguello and Govea stood in line, where Cindy Smith was waiting on other customers.

Smith rang up Arguello's goods and conveyed the total without seeking identification. When Arguello presented her credit card for payment, Smith immediately said, "I will need to see an ID." Arguello, an Oklahoma resident, presented her valid Oklahoma driver's license. Smith refused to accept it relating, "I'm not going to take that." Arguello asked why. Smith said it was not valid. Arguello explained that it was, but Smith refused.

Govea has high blood pressure and takes medication to control it. During the dispute over Arguello's ID, Govea felt ill, sensed his blood pressure rising, and believed he needed to leave the store to avoid health problems. Govea told Arguello, "Let's just get out of here." He placed his intended purchase on the counter and headed toward the exit.

At this point, Smith relented and accepted Arguello's ID and credit card. When the receipt printed, Smith shoved the receipt towards Arguello to sign. Because of Smith's demeanor, Arguello told Smith that she did not have to take it out on her if she did not like her job. Smith said, "f— you,

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[2] This highly abridged Factual Background, though not required in *amicus curiae* briefs, is included for ease of reference and to highlight some of the racial hostility to which the Petitioners were subjected while at the Conoco station.

you f—ing Iranian Mexican bitch, whatever you are." Smith said this as she shoved the receipt at Arguello to sign and as Govea was walking away from the counter. At precisely this moment, Arguello realized that Smith had not charged her for Govea's intended purchase and, while she would normally have asked to complete a second transaction she declined to withstand further racially motivated verbal abuse.

After Smith said, "f—you, you f—ing Iranian Mexican bitch," Arguello signed the receipt and gave Smith a copy. Arguello started to leave but realized that she did not have the proper copy of the receipt so she walked back towards the counter. Smith and Arguello exchanged receipts. As Arguello turned away from the counter a second time, Smith, in a rage, shoved a six-pack of beer off the counter towards Arguello. As Arguello walked out of the store, Smith stood by the window and gestured obscenely, something the Petitioners did not reciprocate.

Smith proceeded to use the store's intercom to broadcast: "go back where you came from, you poor Mexicans" and called the Petitioners "goat smelling Iranians." Arguello's three young children, among others, could hear Smith yelling over the intercom. When Govea attempted to reenter the store in response to Conoco officials' request that Petitioners identify the store clerk in question, Smith locked him out while permitting white patrons to enter the store. In response to Govea's inquiry regarding whether Smith was discriminating against them, Smith responded in the affirmative. During the period after the incident but before Arguello and Govea filed suit, the Petitioners repeatedly contacted Conoco managers to lodge their complaints both verbally and in writing. Conoco summarily rebuffed Petitioners' efforts. The company neither apologized nor responded. To make matters worse, the record is devoid of any attempts by Conoco to obviate the need for injunctive relief by

implementing a policy against discrimination in response to the incident.

According to the Fifth Circuit, none of the conduct alleged in the complaint and proven at trial affected Petitioners' rights, as protected by 42 U.S.C. § 1981 and 42 U.S.C. § 2000a ("Title II"). The Fifth Circuit found that while the store clerk may have deterred Arguello and Govea, she did not prevent either from contracting under the same terms and conditions as white customers. *See Arguello v. Conoco, Inc.*, 330 F.3d 355, 359-360 (5th Cir. 2003). The court also held that neither Petitioner had standing to seek injunctive relief under Title II because neither had any professed intention of returning to that Conoco. *Id.* at 361.

SUMMARY OF THE ARGUMENT

Arguello and Govea pray for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on May 5, 2003. *See Arguello v. Conoco, Inc.*, 330 F.3d 355 (5th Cir. 2003). The NAACP supports the Petition for Writ of Certiorari ("Petition") because it presents substantial questions concerning fundamental civil rights laws that the NAACP relies upon in pursuing its goal of a more egalitarian society.

The Fifth Circuit's decision in *Arguello v. Conoco*, 330 F.3d 355 (5th Cir. 2003) stands out as an anomaly in Title II jurisprudence. It is not a case where mere petty frustrations experienced by paying customers are made fodder for litigation. To the contrary, it was clear to Arguello, Govea, the trial judge and the jury below that Smith treated the plaintiffs poorly precisely because they were Hispanic. Indeed, during the encounter Smith admitted as much. This case is one of those rare species in modern civil rights practice where the discriminator provides the victims with her motive—a case of direct evidence. Despite its acknowledgement of this evidence and the havoc it wreaked on

Arguello and Govea, the Fifth Circuit rendered a decision that permits what Congress and this Court's precedents prohibit. It is incumbent upon this Court to "finally close one door on a bitter chapter in American history" by granting certiorari and reversing the Fifth Circuit's decision in *Arguello*. *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 280 (1964) (concurring opinion of Justice Douglas).

Specifically, the Court should grant the Petition for two primary reasons. First, the Fifth Circuit's construction of standing to pursue an injunction under Title II is heavily flawed and contrary to this Court's Title II jurisprudence. Second, the decision is contrary to the text and legislative purpose of Title II and, if permitted to stand, will make conduct of the sort Conoco exhibited immune from injunctive relief in Texas, Louisiana and Mississippi as well as other jurisdictions in which the *Arguello* decision curries favor.

ARGUMENT

This Court first addressed Title II in *Heart of Atlanta Hotel, Inc. v. U.S.*, 379 U.S. 241, 85 S.Ct. 348 (1964), *Hamm v. City of Rock Hill*, 379 U.S. 306, 85 S.Ct. 384 (1964) and *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377 (1964). In *Heart of Atlanta*, this Court used the Commerce Clause to uphold the constitutionality of Title II. *See Heart of Atlanta*, 379 U.S. at 262 ("[w]e, therefore conclude that the action of Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years").[3] The very same

[3] It bears repeating that Arguello is a Tulsa, Oklahoma resident who was visiting her parents in Fort Worth, Texas when the encounter at Conoco occurred. *See* Petition for Certiorari, Appendix J at 45a; *see also*, Petition for Certiorari, Appendix A, at 2a ("Arguello, an Oklahoma resident, presented Smith with her valid Oklahoma driver's license"). Under the circumstances, Arguello is clearly within the class of transient

day, in *Hamm*, the Court overturned state court convictions in Arkansas and South Carolina based on conduct that occurred prior to the passage of Title II of the Civil Rights Act of 1964, but that was prosecuted after its effective date.[4] The various holdings of these extremely important cases will be for naught, however, if the *Arguello* decision is permitted to stand despite its improper construction of Title II standing and its complete disregard for the text and legislative intent of the statute.

A. The Arguello Decision Establishes A Tortured And Erroneous Interpretation Of Standing Under Title II.

In a pithy four paragraph response to the Petitioners' appeal concerning the judgment in favor of the Respondent on the public accommodations claims, the Fifth Circuit ruled that Arguello and Govea lacked standing to assert their claims under the doctrine of City of *Los Angeles v. Lyons*, 461 U.S. 95 (1983) and its progeny.

It is clear beyond cavil that Congress has the power to "enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *O'Shea v. Littleton*, 414 U.S. 488, 495, n.2 (1974) (citing *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., Concurring); *Hardin v.*

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persons that Title II seeks to protect. *See e.g. Katzenbach*, 379 U.S. at 299-300 (citing congressional testimony for the proposition that the discrimination Title II renders illegal "obviously discourages travel and obstructs interstate commerce").

[4] Constance Baker Motley and Jack Greenberg represented the petitioners in *Hamm*. Significantly, Ms. Motley and Mr. Greenberg were NAACP Legal Defense & Educational Fund (hereinafter "LDF") attorneys. LDF is former affiliate of the National Association for the Advancement of Colored People. *See N.A.A.C.P. v. N.A.A.C.P. Legal Defense & Educational Fund, Inc.*, 753 F.2d 131 (D.C. Cir.), *cert* denied 472 U.S. 1021, 105 S.Ct. 3489 (1985).

Kentucky Utilities Co., 390 U.S. 1, 6 (1968); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n. 3 (1973). This power is checked by Article III's requirement that an "invasion of the statutory right *has occurred or* is likely to occur." *O'Shea*, 414 U.S. at 495, n.2. Where Congress has properly exercised its authority to legislate pursuant to whatever constitutional provision is applicable (e.g. pursuant to the Commerce Clause or the Fourteenth Amendment) and a violation of the statute occurs, standing is conferred upon the injured party.

Title II prohibits race discrimination and other types of discrimination in places of public accommodation. The reality of Title II is that it is a statute aimed entirely at providing injunctive relief to plaintiffs and the class of citizens similarly situated. As this court observed in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966 (1968):

> When a plaintiff brings an action under [Title II], he cannot recover damages. If he obtains an injunction, he does so not for himself alone, but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority.

Id. (citations omitted).

The clear import of the Court's opinion in *Newman* is that injunctive relief pursuant to Title II favors not only the individual plaintiff, but also the class of individuals similarly situated. Under the circumstances, the Fifth Circuit's reasoning in *Arguello* that plaintiffs had to show some likelihood that they, themselves, would be harmed in the absence of an injunction, is heavily flawed as courts sitting in equity have greater latitude to grant injunctive relief "in furtherance of the public interest . . . than when only private interests are involved." *Virginian Ry. Co. v. System Feder-*

ation No. 40, 300 U.S. 515, 552 (1937) (citations omitted).[5] Indeed, injunctive relief in *Arguello* would presumably have entailed mandating that Conoco implement a non-discrimination policy that has heretofore been absent. Injunctive relief would likely have included mandatory training on cultural sensitivities and anti-discrimination laws. Such an injunction would have countless beneficiaries of all races from both within and without Conoco.

In *Katzenbach*, the Court realized the constitutional import of the various Title II cases before it and declined the United States' effort to have the matter dismissed on prudential grounds. As succinctly stated by the Court,

> [t]he appellants [Attorney General Nicholas deB. Katzenbach and others] moved in the District Court to dismiss the complaint for want of equity jurisdiction and that claim is pressed here. The grounds are that the Act authorizes only preventive relief; that *there has been no threat of enforcement against the appellees and that they have alleged no irreparable injury.*

Katzenbach, 379 U.S. at 295 (emphasis added).

After reciting a laundry list of reasons why the case might not be heard, including the fact that Title II includes a statutory proceeding for a determination of rights and duties, the Court went on to note that, "[i]t is important that a decision on the constitutionality of the Act as applied in these cases be announced as quickly as possible." *Katzenbach*, 379 U.S. at 296. Thereafter, the Court proceeded to decide the merits of Ollie McClung's challenge to the constitutionality

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[5] Since Article III standing is a matter for the Court to determine **and** because Congress already created Title II as a tool for those denied access or full enjoyment of public accommodations on the basis of race, this is not a case in which the Court can refer putative Title II plaintiffs to the legislature for prospective recourse. *Cf. Groupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 333 (1999).

of Title II as applied to his restaurant, "Ollie's Barbecue." *Id.* Hence, in *Katzenbach*, the Court did not shy away from its responsibility to interpret the constitutionality of Title II. Similarly, in this case, the Court should determine whether standing to assert a Title II claim is on par with standing to assert a claim against future use of life threatening police holds under 42 U.S.C. § 1983. *See, City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

The *Arguello* decision poses a significant disincentive to civil rights advocates and their lawyers to even bring Title II cases. When it serves as a plaintiff in litigation, the NAACP's principle aim is to obtain injunctive relief. This Court observed in *Newman* that at the time of its passage, it was presumed that enforcement of Title II "would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law." *Newman*, 390 U.S. at 401. However, in the wake of *Arguello*, groups like the NAACP will be hard pressed to encourage experienced and able counsel to assist them in bringing Title II claims even in the most egregious of circumstances. Yet when the United States Department of Justice has only filed approximately twelve Title II pattern and practice cases since 1998[6] and the NAACP cannot take on every alleged offender, it is simply improper to require individual plaintiffs to prove a likelihood of future injury in order to prevail.

The NAACP notes that *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), is inapplicable to Title II claims. While it is clear that *Katzenbach* and *Newman* predated *Lyons*, it is equally clear that the Court's decision in *Lyons* is inapposite

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[6] *See* United States Department of Justice Civil Rights Division, Housing and Civil Enforcement Section CASES, available at http://www.usdoj.gov/crt/housing/caselist.htm (last visited September 29, 2003) (summarizing thirteen cases brought under Title II, the oldest of which, against Denny's, Inc., was brought in 1993).

to claims of public accommodations discrimination under Title II. Title II claims seeking an injunction barring race discrimination, the only remedy provided by the Act, are patently different from claims brought under 42 U.S.C. § 1983, in part, because they do not concern issues of federalism. Along this same vein, *Lyons* relied heavily upon this Court's decision in *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669 (1974), another case involving the delicate balance between federal and state spheres of influence. In *O'Shea*, there was neither a claim of past injury to the named plaintiffs, nor claims of the continuing effects of past injuries. In addition, whereas in *O'Shea*, the Court declined to issue injunctions of state court prosecutions pursuant to 42 U.S.C. §§ 1981, 1983 and 1985, it observed no such standing infirmities in permitting injunctions barring state court prosecutions pursuant to Title II in *Hamm*. *Compare*, *O'Shea*, 414 U.S. at 493 ("[t]he complaint failed to satisfy the threshold requirement imposed by Art. III of the Constitution that those who seek to invoke the power of the federal courts must allege an actual case or controversy") with *Hamm*, 379 U.S. at 308 ("[w]e hold that the convictions must be vacated and the prosecutions dismissed."). Moreover, unlike plaintiffs in 42 U.S.C. § 1983 cases, the victim of discrimination encountered in a covered public accommodation seeks an injunction in her capacity as a 'private attorney general' on behalf herself and others similarly situated even when the case is not styled as a class action.

Finally, there are a growing number of cases challenging associations like the NAACP's representative standing on grounds that the injuries sustained by the organizations are self-inflicted. *See e.g. Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1994); *Fair Housing Counsel v. Montgomery Newspapers*, 141 F.3d 71, 80 (3rd Cir. 1998); *Ass'n For Retarded Citizens v. Dallas County Mental Health & Mental Retardation Ctr. Bd. Of Trustees*, 19 F.3d 241, 244 (5th Cir.

1994). The theory asserts that organizations cannot allege deprivation of resources and frustration of purpose as grounds for standing when they know, going into an investigation or litigation, that a given putative defendant discriminates or is likely to discriminate on grounds of race. According to these cases, such 'self-inflicted' injuries are not actionable. In *Arguello*, we see the flip side of that argument where individuals are denied the right to seek injunctive relief because they testify honestly about the likelihood of visiting a place of public accommodations that, based on their personal experience, they know discriminates against members of their race. Thus, the *Arguello* decision presents one side of a cruel Hobson's choice for those seeking to address Title II claims between bringing cases as individuals and *lying* or as institutions and *losing*.

B. Arguello Conflicts With The Plain Language And Legislative Intent Of Title II.

The text of Title II of the Civil Rights Act of 1964 provides ample support for the construction that Petitioners are pressing in the petition for writ of certiorari. Section 201(a) of the Act provides that:

> All persons shall be entitled to the *full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations* of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

Section 201(a) (emphasis added).

In addition, § 2000a-2 states that "[n]o person shall withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive any person" of the rights enumerated in the statute. Section 2000a-3(a) provides that "[w]henever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice

prohibited by section 2000a-2 . . . , a civil action for preventive relief, including an application for a permanent or temporary injunction . . . may be instituted by the person aggrieved." In short, as this Court succinctly put it, "Section 201(a) of Title II commands that all persons shall be entitled to the full and equal enjoyment of the goods and services of any place of public accommodation without discrimination or segregation on the ground of race, color, religion, or national origin." *Katzenbach v. McClung*, 379 U.S. 294, 299 (1964).

At bare minimum, the "full enjoyment" of a "privilege" of shopping in a convenience store operated in conjunction with a gas station should include the right to be free from overt race discrimination and a barrage of racially derogatory insults. Permitting public accommodations to harangue Hispanics, African Americans or other individuals on the basis of race so long as the victims lack an immediate intention to return or a likelihood of returning runs completely contrary to Title II. Had Congress only been concerned with retail recidivism, it would not have accentuated that it was protecting the 'Negro' right to interstate travel. *See Heart of Atlanta*, 379 U.S. at 252-253 (citations omitted). It strains credulity to assume that the drafters of the house and senate bills that ultimately became Title II would take a charitable view of Conoco's conduct towards Arguello and Govea because if it is permitted to continue unabated it will have "a qualitative as well as quantitative effect on interstate travel" by Hispanics. *Heart of Atlanta*, 379 U.S. at 253. It is an even greater strain to imagine that the congress that passed Title II might find Conoco's conduct outside of the ambit of the statute.

To be sure, notwithstanding the NAACP's mandate, race discrimination is not, by its mere existence, actionable unless the conduct challenged violates an existing statute or constitutional provision. Here, Conoco's conduct violated Title II because it clearly discriminated against Arguello and

Govea on the ground that they are Hispanic. In its decision, however, the *Arguello* court created a loophole that threatens to swallow Title II in its entirety. Moreover, by construing the unambiguous language of Title II of the Civil Rights Act of 1964 *in pari materia* with the provisions of 42 U.S.C. § 1981 of Civil Rights Act of 1866, as amended, the Fifth Circuit conflated the aims of two very different statutes and their respective standards of proof. *Compare Arguello*, 330 F.3d at 361 ("if Arguello and Govea have no cause of action under § 1981, they have no closer relationship to future conduct than does any member of the general public"); with *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (holding that 42 U.S.C. § 1982 provides a separate remedy for housing discrimination from the Fair Housing Act, 42 U.S.C. §§ 3601-3631); *Sullivan v. Little Hunting Park*, 396 U.S. 229, 237-238 (1960) (holding that a § 1982 claim is not subject to the administrative requirements of the Civil Rights Act of 1964 because the acts provided for separate forms of recovery); *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975) (holding that Title VII of the Civil Rights Act of 1964 and § 1981 create two separate actions, are subject to different procedures and create different remedies though both may apply to a given situation). In sum, this Court has never been so cavalier in its treatment of the relationship between the various civil rights statutes.

In construing the provisions of Title II, this Court has repeatedly looked to the legislative history of the statute to determine congressional intent. *See e.g. Hamm*, 379 U.S. at 310-311 and 315; *see also Hamm* 379 U.S. at 317 (Justices Douglas and Goldberg, concurring); *Heart of Atlanta*, 379 U.S. at 245-246, 249-250 and 252-253; *Katzenbach*, 379 U.S. at 299-300 and 303-304; *United States v. Johnson*, 390 U.S. 563, 564-565 (1968). That history includes Congress' recognition that the purpose of the legislation was to "make it possible to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly

open to the general public." H.R. Rep. No. 88-914 (1963), reprinted in 1964 U.S.C.C.A.N. 2455, 2393-94; *see also*, Anne-Marie G. Harris, Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling, 23 B.C. Third World L.J. 1, 22 (2003). As one Senator observed:

> The truth is that *the affronts* and denials that this section, if enacted, would correct *are intensely human and personal. Very often they harm the physical body, but always they strike at the root of the human spirit, at the very core of human dignity.*

S. Rep. No. 88-872 (1964), reprinted in 1964 U.S.C.C.A.N. 2355, 2369 (emphasis added).

In one of its many passes at the legislative history of Title II, this Court credited Senator Young's statement that "[t]he enforcement provisions of title [sic] II are based on the specific prohibition in section 203 against denying *or interfering with* the right to the nondiscriminatory use of facilities covered by the title." *United States v. Johnson*, 390 U.S. at 565, citing 110 Cong.Rec. 7384 (emphasis supplied). It is beyond dispute that Smith, in her capacity as a Conoco employee, interfered with the Petitioners' nondiscriminatory use of the gas station and attendant convenience store. By denying Petitioners' claims for injunctive relief in the face of volumes of direct evidence of race discrimination and an unrepentant corporate discriminator, the Fifth Circuit ignored this Court's precedents and effectively sounded the death knell for Title II enforcement in Texas, Mississippi and Louisiana.[7]

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[7] The NAACP takes for granted that Conoco lacks a non-discrimination policy and is therefore confident in its assertion that Respondent is unrepentant. As the District Court observed, "[t]here is no policy by the defendant involved. There is no policy saying discriminate, there is no policy saying, don't discriminate. I suppose that's as broad as it is long." Petition for Certiorari, Appendix at 32a-33a.

As further evidence of the public policy aims of Title II, Justice Black's concurrence in Heart of Atlanta is quite insightful. Referencing Bureau of Census data and the congressional record, Justice Black observed:

> There are approximately 20,000,000 Negroes in our country. Many of them are able to, and do, travel among the States in automobiles. Certainly it would seriously discourage such travel by them if, as evidence before the Congress indicated has been true in the past, they should in the future continue to be unable to find a decent place along their way in which to lodge or eat.

Heart of Atlanta, 379 U.S. 275-276 (concurrence of Justice Black) (internal citations omitted).

Justice Black's observations in 1964 are quite poignant when considered in conjunction with the fact that today there are approximately 36,275,303 individuals of Hispanic or Latino origin in addition to 38,318,939 black or African American individuals residing in the United States.[8] Moreover, the likelihood that these minorities will own and drive cars between and among the states has increased exponentially since 1964 when this Court decided *Heart of Atlanta*. Under the circumstances, the availability of gas stations willing to serve minorities in a manner that eschews outright verbal and physical racial hostility is not only appropriate, but necessary.

CONCLUSION

In recent years, this Court has granted certiorari to uphold the principle of *stare decisis* in its Equal Protection jurisprudence, *Grutter v. Bollinger*, ___ U.S. ___, 123 S.Ct. 2325

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[8] *See* Bureau of the Census, July 1, 2002 Population Estimates, available at http://eire.census.gov/popest/data/states/ST-EST2002-ASRO-04.php (last visited September 24, 2003).

(2003) (upholding Sixth Circuit's application *Bakke's* diversity rationale for racially based affirmative action in university admissions), and to resolve circuit conflicts in favor of the construction of a civil rights statute's plain language. *Desert Palace, Inc. v. Costa*, ___ U.S. ___, 123 S.Ct. 2148 (2003) (affirming 9th Circuit's construction of plain language of the Civil Rights Act of 1991 to permit a plaintiff-friendly mixed-motive jury instruction even in the absence of direct evidence of discrimination). In still other instances, this Court has intervened in cases where lower courts have engaged in judicial activism to roll back significant civil and constitutional rights gains. *See e.g. Reeves v. Sanderson Plumbing Search Term End Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000) (eradicating some circuits' pretext plus methodology for evaluating dispositive motions in Title VII cases); *Kolstad v. American Dental Assoc'n*, 527 U.S. 526, 119 S.Ct. 2118 (1999) (using plain language approach to Civil Rights Act of 1991 to reverse D.C. Circuit's erroneous construction of punitive damages provisions of Title VII, 42 U.S.C. § 1981a, as requiring showing of 'egregiousness'); *United States v. Dickerson*, 530 U.S. 428, 120 S.Ct. 2326 (2000) (reversing Fourth Circuit's attempted overruling of *Miranda* purportedly by virtue of 18 U.S.C. § 3501).

The time to reign in an errant Circuit Court decision while providing guidance as to the appropriate construction of a statute is once again upon us. The NAACP supports the present petition for certiorari because the Fifth Circuit's decision with respect to Petitioners' 42 U.S.C. §§ 1981 and 2000a claims is at odds with the plain language of both statutes and contrary to the law as applied by this Court.[9]

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[9] While the 42 U.S.C. § 1981 claim is beyond the scope of this amicus brief, the NAACP hereby adopts the arguments of both the Petitioners and the Lawyers' Committee for Civil Rights Under Law.

The NAACP respectfully prays that the Court grant the Petition for Writ of Certiorari as to both questions 1 and 2. While this amicus brief is limited to addressing the Petitioners' Title II public accommodations claims, it is generally recognized that the Fifth Circuit erred as to all of the Petitioners' claims. Should the Court deny the Petition, individuals subjected to overt, unabashed and highly egregious racism in the context of seeking accommodations in places admittedly covered by Title II will lack any of the protections provided by Congress. Moreover, if the Court denies the Petition, civil rights plaintiffs throughout the Nation will be hard pressed to resurrect Title II as a viable means of effectuating the anti-discrimination imperatives of the Civil Rights Act of 1964 and courts unsympathetic with the aim of Title II will be emboldened to ignore the statute and this Court's precedents which apply it.

Respectfully submitted,

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October 6, 2003

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IN THE
Supreme Court of the United States

DENISE ARGUELLO and ALBERTO GOVEA
Petitioners,

v.

CONOCO, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC.; NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM; PUBLIC JUSTICE CENTER; AND SOUTHERN POVERTY LAW CENTER; AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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IN THE
SUPREME COURT OF THE UNITED STATES

Denise Arguello and Alberto Govea,

Petitioners,

v.

Conoco, Inc.,

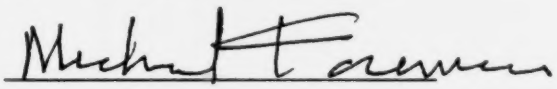
Respondent.

MOTION FOR LEAVE TO FILE A BRIEF *AS AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"), the Mexican American Legal Defense and Educational Fund, Puerto Rican Legal Defense and Education Fund, Inc., the National Asian Pacific American Legal Consortium, the Public Justice Center and the Southern Poverty Law Center move for leave, pursuant to Rule 37.2 (b) of the Rules of the Supreme Court of the United States, to file a brief as *amici curiae* in support of Petitioners in order to place before the Court relevant matter that has not already been brought to its attention.

The interest of the *amici* in the issues raised here are longstanding and a decision of the Court will impact literally millions of constituents served by the *amici*. The interests of the proposed *amici* are set forth in the Statement of Interest herein.

The Lawyers' Committee has a continuing interest in this case having filed an *amicus curiae* brief before the Fifth Circuit Court of Appeals and presented argument before the Fifth Circuit. We file herewith a letter of consent from Petitioner's Counsel. The Respondent opposes the filing of this *amici curiae* brief.



Michael L. Foreman

October 6, 2003

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

INTEREST OF THE AMICI CURIAE.....1

SUMMARY OF ARGUMENT.....4

ARGUMENT.....4

I. THIS COURT SHOULD ENSURE A CONSISTENT NATIONWIDE APPLICATION OF THIS HISTORICALLY IMPORTANT CIVIL RIGHTS STATUTE IN ACCORDANCE WITH ITS PLAIN MEANING AND LEGISLATIVE INTENT.....5

II. THE CURRENT SPLIT IN CIRCUITS EXTENDS LIMITED PROTECTION FROM RACIAL DISCRIMINATION IN CONTRACTING TO CONSUMERS IN SOME CIRCUITS WHILE THOSE IN OTHER CIRCUITS ARE PROTECTED FROM RACIAL DISCRIMINATION IN ALL ASPECTS OF THE CONTRACTING PROCESS.....6

III. RACIAL DISCRIMINATION IN RETAIL CONTEXTS IS A SIGNIFICANT AND CONTINUOUS PROBLEM THAT WARRANTS ATTENTION BY THIS COURT.....10

CONCLUSION.....13

TABLE OF AUTHORITIES

Cases:

Arguello v. Conoco, Inc., 330 F.3d 355 (5th Cir. 2003).....5

Bobbitt v. Rage Inc., 19 F. Supp. 2d 512 (W.D.N.C. 1998)...8

Christian v. Wal-Mart Stores, Inc., 252 F.3d 862 (6th Cir. 2001).....7, *passim*

Garrett v. Tandy Corp., 295 F.3d 94 (1st Cir. 2002).....9, *passim*

Hall v. Pennsylvania State Police, 570 F.2d 86 (3d Cir. 1978).....7

Hampton v. Dillard Dep't Stores, Inc., 247 F.3d 1091 (10th Cir. 2001).....8

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)..... 4, *passim*

Joseph v. New York Yankees Partnership, No. 00 Civ. 2275 (SHS) (S.D.N.Y. Oct. 19, 2000), 2000 U.S. Dist. LEXIS 15417.....1.....8

Kelly v. Bank Midwest, N.A., 161 F. Supp. 2d 1248 (D. Kan. 2001).....8

Patterson v. McLean Credit Union, 491 U.S. 164 (1989).....6, 10

Roberts v. Wal-Mart Stores, Inc., 769 F. Supp. 1086 (E.D. Mo. 1991).....12

Runyon v. McCrary, 427 U.S. 160 (1976).....10

Washington v. Duty Free Shoppers, Ltd., 710 F. Supp. 1288 (N.D. Cal. 1988).....8

Watson v. Fraternal Order of Eagles, 915 F.2d 235 (6th Cir. 1990).....7

Youngblood v. Hy-Vee Food Stores, Inc., 266 F.3d 851 (8th Cir. 2001).....9

Statutes:

42 U.S.C § 1981 (1991).....4, *passim*
42 U.S.C. § 2000(a) (1992).....4

Other Authorities:

Thomas Ainscough & Carol Motley, *Will You Help Me Please? The Effects of Race, Gender and Manner of Dress on Retail Service*, 11 MARKETING LETTERS 129 (2000).....12

Regina Austin, *Bad for Business: Contextual Analysis, Race Discrimination and Fast Food*, 34 J. MARSHALL L. REV. 207 (2000).....11

Ian Ayers, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991).....11

Mary Anne Case, *Developing a Taste for Not Being Discriminated Against*, 55 STAN. L. REV. 2273 (2003).....11

Matt Graves, *Purchasing While Black: How Courts Condone Discrimination in the Marketplace,* 7 MICH. J. RACE & L. 159 (2001).....11

Anne-Marie G. Harris, *Shopping While Black: Applying 42U.S.C. § 1981 to Cases of Consumer Racial Profiling*, 23 B.C. THIRD WORLD L.J. 1 (2003).....11

Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model,* 85 MINN. L. REV. 1591 (2001).....11

Deseiree Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection,* 66 MO. L. REV. 275 (2001).....11

Amanda G. Main, *Racial Profiling in Places of Public Accommodation: Theories of Recovery and Relief,* 39 BRANDEIS L.J. 289 (2000-2001).....11

Reginald T. Shuford, *Civil Rights in the Next Millennium: Any Way You Slice It: Racial Profiling is Wrong,* 18 ST. LOUIS U. PUB. L. REV. 371 (1999).....11

INTEREST OF THE AMICI CURIAE

The proper construction of 42 U.S.C. §1981 lies at the heart of the missions of the *amici curiae*.[1] Section 1981 embodies the core principles that guided the rebuilding and healing of our nation after the abolition of slavery and the end of the Civil War. The 1991 Amendment to § 1981 reinforced this nation's reliance on this statute as a powerful weapon toward eradicating racial discrimination in retail contracts. While all statutes are to be construed to effectuate their legislative purposes, this principle of statutory construction is particularly significant for a statute enacted to serve the essential national purpose of ending racial discrimination.

The *amici* all have a historical dedication toward the elimination of discrimination against persons of color in all aspects of public life. The *amici* represent, literally, millions of people of color who are protected by, and would be harmed by an unjustifiably narrow interpretation of §1981.

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, in order to help defend the civil rights of minorities and the poor. Through the Lawyers' Committee and its Affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country, challenging racial discrimination in virtually all aspects of American life,

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[1] Counsel for the *amici curiae* authored this brief in its entirety. No person or entity other than *amici curiae*, their staffs, or their counsel made monetary contribution to the preparation or submission of this brief. A copy of the Petitioner's letter of consent is filed herewith. As stated in the motion to file this brief, the Respondent has not consented.

including racial discrimination cases brought under 42 U.S.C. § 1981.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF has litigated numerous cases under 42 U.S.C. § 1981 since the organization's founding. Preserving the rights of Latinos to be free of discrimination in all aspects of social interaction is a primary goal of MALDEF's efforts.

The Puerto Rican Legal Defense and Education Fund, Inc. ("PRLDEF") is a national non-profit civil rights organization founded in 1972. PRLDEF is dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos through litigation and policy advocacy. Since its inception, PRLDEF has participated both as direct counsel and as *amicus curiae* in numerous cases throughout the country concerning the proper interpretation of the civil rights laws.

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal, public policy, advocacy, and community education on discrimination issues. NAPALC and its Affiliates have a long-standing commitment in addressing matters of discrimination that have an impact on the Asian Pacific American community, and this interest has resulted in NAPALC's participation in a number of *amicus* briefs before the courts.

The Public Justice Center (PJC) is a non-profit civil rights and anti-poverty legal services organization dedicated to protecting the rights of the underrepresented. Established in 1985, the PJC has used impact litigation, public education, legislative advocacy, and appellate advocacy to accomplish law reform for its clients in the areas of civil rights, disability rights, housing, employment, health care, and children's rights. The PJC has a long-standing commitment to fighting discrimination on the basis of race and national origin.

The Southern Poverty Law Center ("The Center"), founded in 1971, is a national, non-profit organization dedicated to combating intolerance and discrimination through litigation and education. The Center has litigated dozens of death penalty cases and numerous pioneering civil rights cases on behalf of women, minorities, immigrants, factory workers, poor people in need of health care, mentally ill persons, children in foster care, prisoners facing barbaric conditions of confinement and many other victims of injustice. The Center has litigated and won six landmark civil rights lawsuits before the United States Supreme Court, including the recent case *Hope v. Pelzer*, 122 S. Ct. 2508 (2002).

The efforts of the *amici* helped persuade Congress to enact the Civil Rights Act of 1991. A major purpose of that legislation was the restoration of 42 U.S.C. § 1981 as a viable remedy for racial discrimination at all stages, and in all aspects, of contracting. This Court should grant certiorari to resolve the current split in the circuits and to ensure there is a consistent national application of § 1981 honoring its legislative intent.

SUMMARY OF ARGUMENT

The question concerning the scope of protection from discrimination afforded by 42 U.S.C. § 1981 demands the attention of the Court.[2] The petition for certiorari should be granted to address the inconsistent application of this federal law by the courts of appeal and the continuing discrimination experienced by millions of consumers of color.

The plain meaning and legislative purpose of § 1981 supports meaningful federal protection in retail contexts. The legislative purpose of this historical statute was to ensure that freed slaves had access to economic opportunities that white customers already enjoyed. Congress, in 1991, affirmed this purpose by amending the law to clarify any confusion about its scope.

Nevertheless, the circuits are split resulting in inconsistent applications of this important civil rights law. These compromised interpretations of § 1981 further exacerbate documented racial discrimination that continues to exist in the retail setting.

ARGUMENT

"[A] dollar in the hands of a Negro [should] purchase the same thing as a dollar in the hands of a white...."[3]

In the context of analyzing the scope and purpose of § 1981 as a means to fulfill the promise of freedom made by the Thirteenth Amendment, the Court made this predictive

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[2] The petition for certiorari raises two distinct questions: (1) the scope of 42 U.S.C. § 1981 in the retail context; and (2) the scope of 42 U.S.C. § 2000(a). While the *amici* believe both questions warrant this Court's review, here the *amici* only address the importance of question one.

[3] *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409, 443 (1968).

statement. This Court should grant certiorari to ensure this recognized purpose of remedying discrimination which prevented freed men from exercising their "great fundamental rights" and to "go and come at pleasure" [4] continues to have meaning. Further, this Court should ensure that this important civil rights law is consistently applied across our nation resolving the split in circuits over its proper scope.

The Fifth Circuit Court held that Ms. Arguello and Mr. Govea, the petitioners, failed to show their actual ability to contract was interfered with despite the fact that the respondent's employee racially harassed them throughout their encounter in a store. *Arguello v. Conoco, Inc.*, 330 F. 3d 355, 356-57 (5th Cir. 2003). Section 1981 is intended to empower all persons to contract without suffering race discrimination. The Court must intervene to define the appropriate boundaries of § 1981 and to protect consumers in a manner that discourages racial discrimination in all aspects of a contractual relationship.

I. THIS COURT SHOULD ENSURE A CONSISTENT NATIONWIDE APPLICATION OF THIS HISTORICALLY IMPORTANT CIVIL RIGHTS STATUTE IN ACCORDANCE WITH ITS PLAIN MEANING AND LEGISLATIVE INTENT.

42 U.S.C. § 1981, one of our nation's first federal civil rights statutes, should be consistently applied nationwide. Section 1981 commands that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce

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[4] *Jones*, 392 U.S. at 437 (after reviewing the legislative history of the Civil Rights Act of 1866, the Court concluded it should "accord [§1981] a sweep as broad as its language").

contracts as is enjoyed by white citizens." 42 U.S.C. § 1981(a). In *Patterson v. McLean Credit Union*, 491 U.S. 164, 171 (1989), the Court limited the reach of §1981 holding that ". . . §1981 [did] not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations."

Congress immediately responded with an amendment which clarified the statute's purpose and scope -- to prohibit discrimination in all aspects of a contractual relationship. Congress clarified that § 1981 prohibits discrimination in "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Further clarifying, Congress provided that: "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of ***all*** benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981 (b) (emphasis added).

The Fifth Circuit's narrow application of § 1981 strips the congressional intent from this statute and is at odds with the broader interpretation taken by other circuits.

II. THE CURRENT SPLIT IN CIRCUITS EXTENDS ONLY LIMITED PROTECTION FROM RACIAL DISCRIMINATION IN CONTRACTING TO CONSUMERS IN SOME CIRCUITS WHILE THOSE IN OTHER CIRCUITS ARE PROTECTED FROM RACIAL DISCRIMINATION IN ALL ASPECTS OF THE CONTRACTING PROCESS.

This Court should act to correct the growing inconsistency of how § 1981 prohibits racial discrimination in retail contexts. Circuits that appear to adopt the narrow

interpretation of the Fifth Circuit undermine the federal protection once assured to African Americans, while other circuits continue to interpret § 1981 more broadly. In contrast to the narrow interpretation adopted by the Fifth and Eighth Circuits, the First[5], Third, Sixth, and Tenth Circuits recognize the explicit intent of Congress that § 1981 protects individuals from all racial discrimination in all aspects of the making of retail contracts. These circuits have applied § 1981 protection to retail claims in recognition that minority customers should enjoy the same contract conditions as white customers, whether they complete their transactions or not.

For some circuits, § 1981 extends protection to conditions and terms before and after a consumer's purchase. The Third Circuit, for example, held that a bank customer's § 1981 claim was actionable where police photographed him because of his race. According to the Third Circuit, "§1981 obligates commercial enterprises to extend the same treatment to contractual customers 'as is enjoyed by white citizens.'" *Hall v. Pennsylvania State Police*, 570 F.2d 86, 92 (3d Cir. 1978).

The Sixth Circuit, likewise, appears to take a broad interpretation of § 1981. For example in *Watson v. Fraternal Order of Eagles*, 915 F.2d 235 (6th Cir. 1990), the Sixth Circuit held that a private club's removal of two black guests to prevent them from purchasing soft drinks denied them the equal right to contract. *Watson*, 915 F.2d at 243. The court found the fact that the plaintiffs were never refused service to be insignificant because § 1981 protects African Americans from behavior aimed at avoiding contracting with them. *Id.* The Sixth Circuit recently reaffirmed *Watson* and clarified the broadness of §1981's reach in a well reasoned discussion of the plaintiff's *prima*

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[5] See discussion *infra* for a more detailed analysis of the position taken by the First Circuit.

facie case. *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 867-73 (6th Cir. 2001). The Sixth Circuit explained that the *prima facie* case "which makes actionable the deprivation of service, as opposed to an outright refusal of service, better comprehends the realities of commercial establishment ...." *Id.* at 873.

The Tenth Circuit, also, appears to have adopted a broad interpretation of the scope of § 1981's protections. In *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091 (10th Cir. 2001), the Tenth Circuit acknowledged that § 1981 is applied "to remedy 'any act of discrimination committed in the making or the performance of a contract.'" *Id.* at 1118 (citations omitted). At least one lower court has read *Hampton* as suggesting "that a section 1981 claim is actionable where different conditions are placed upon an African-American plaintiff's right to enter contractual relations, even when that plaintiff eventually enters the contract." *Kelly v. Bank Midwest, N.A.*, 161 F. Supp. 2d 1248, 1256 (D.Kan. 2001)[6]

Other lower courts have also held that 1981's application is not limited to the precise moment of contract formation. *See e.g. Joseph v. New York Yankees Partnership*, No. 00 Civ. 2275 (SHS) (S.D.N.Y. Oct. 19, 2000), 2000 U.S. Dist. LEXIS 15417; *Bobbitt v. Rage Inc.*,

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[6] Contrary to the Tenth Circuit Court of Appeals' characterization of the arguments made by the Lawyers' Committee for Civil Rights Under Law in *Hampton*, 247 F. 3d at 1118, the Lawyers' Committee for Civil Rights Under Law did not argue that § 1981 protects customers from racial harassment merely based upon a person's entry to a retail establishment. Rather the argument made there was that if a racial minority is subject to different treatment, not endured by whites, which interferes with the opportunity to contract, a § 1981 claim is made. In a racial harassment context, the harassment is a hoop through which minority customers have to jump that is not required of non-minority customers. The minority customers are required to "run a gauntlet of [racial epithets] in return for the privilege of being allowed to [purchase goods or services]." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

19 F. Supp. 2d 512, 518-20 (W.D.N.C. 1998); *Washington v. Duty Free Shoppers, Ltd.*, 710 F. Supp. 1288, 1289-90 (N.D. Cal. 1988).

Nevertheless, at least one circuit court appears to have adopted the Fifth Circuit's restrictive approach requiring an outright refusal to contract. The Eighth Circuit has suggested that, "once the purchase is completed, no contractual relationship remains." *Youngblood v. Hy-vee Food Stores, Inc.*, 266 F.3d 851, 854 (8th Cir. 2001).

The First Circuit decision in *Garrett v. Tandy Corp.*, 295 F.3d 94, 101- 02 (1st Cir. 2002) demonstrates the confusion created by the circuit split. In first addressing the restrictive interpretation of the Fifth and Eighth Circuits, the First Circuit observed "[w]e are not comfortable with all of these outcomes, nor do we make a wholesale endorsement of the reasoning employed by these courts." *Garrett*, 295 F.3d at 100. Then, appearing to adopt the more expansive approach of the Sixth Circuit, the *Garrett* court observed

> The 1991 expansion of the definition 'make and enforce contracts' in section 1981, then, extends the reach of the statute to situations beyond the four corners of a particular contract; the extension applies to those situations in which a merchant, acting out of racial animus, impedes a customer's ability to enter into, or enjoy the benefits of, a contractual relationship.

Garrett, 295 F.3d at 100 (citing *Christian*, 252 F.3d at 872.) The *Garrett* court concluded, however, that "[i]n the last analysis, however, the doctrinal rule established in these cases seems sound, even if the application of the rule is questionable." *Id.* The enforcement of one of the nation's premier civil rights laws should not depend on interpretations and applications that are "questionable."

The Courts adopting a narrow interpretation of § 1981 limit its application to the actual formation of the contract. Also, these Courts have not only narrowly focused on the precise instant the contract is consummated, but also failed to recognize that actions both preceding and following this precise moment can also "interfere with the ability to make contracts." 42 U.S.C. §1981(b).

The result of this split among the circuits is that people do not enjoy the same protection against race discrimination in some circuits as they do in others, even though a federal statute exists to shield them from this discrimination. 42 U.S.C. §1981(1991). This Court should address the absurd reality in the circuits adopting this narrow interpretation of § 1981, that a merchant may exercise any form of racial harassment against consumers and § 1981 is not violated as long as they actually complete the contract.

III. RACIAL DISCRIMINATION IN RETAIL CONTEXTS IS A SIGNIFICANT AND CONTINUOUS PROBLEM THAT WARRANTS ATTENTION BY THIS COURT.

Our nation's intent that persons of all races have an equal opportunity to enter into contracts is not in dispute. *See generally Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (explaining the legislative history and Congress's intent for the Civil Rights Act of 1866). *See also Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (the Supreme Court "reaffirm[s] that § 1981 prohibits racial discrimination in the making and enforcement of private contracts); *Runyon v. McCrary*, 427 U.S. 160, 168 (1976) (declaring that "it is now well established that s 1 of the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. s 1981, prohibits racial discrimination in the making and enforcement of private contracts.")

Unfortunately, the disparate shopping and dining experiences of people of color have been well documented in contemporary television news magazines, such as "Prime Time Live" and "20/20," which have reported the harassment and animus associated with being a consumer of color in the United States.[7] These types of experiences are not just fodder for popular culture debate but have been analyzed in many of our nation's academic journals. These academic studies bolster the perception of some consumers of color that they are being treated differently.[8]

Indeed, an electronic legal search uncovered in excess of 100 articles discussing the uneven application of the protections afforded by § 1981 in the retail contracting context.[9] In short, the experiences of Ms. Arguello and Mr. Govea are not isolated examples of racial discrimination in retail establishments but are only part of a pervasive and harsh reality. The treatment they received illustrates that the

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[7] Anne-Marie G. Harris, *Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling*, 23 B.C. Third World L.J. 1, 3 (2003).

[8] Ian Ayers, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 Harv. L. Rev. 817 (1991).

[9] The search was performed using LexisNexis on September 23, 2003. In addition to the law review articles cited *infra*, some of the most current and relevant articles are as follows: Deseiree Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 Mo. L. Rev. 275 (2001); Amanda G. Main, *Racial Profiling in Places of Public Accommodation: Theories of Recovery and Relief*, 39 Brandeis L.J. 289 (2000-2001); Regina Austin, *Bad for Business: Contextual Analysis, Race Discrimination and Fast Food*, 34 J. Marshall L. Rev. 207 (2000); Matt Graves, *Purchasing While Black: How Courts Condone Discrimination in the Marketplace*, 7 Mich. J. Race & L. 159 (2001); Mary Anne Case, *Developing a Taste for Not Being Discriminated Against*, 55 Stan. L. Rev. 2273 (2003) (a book review symposium on the Ian Ayers book Pervasive Prejudice? Unconventional Evidence of Race and Gender Discrimination); Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 Minn. L. Rev. 1591 (2001).

descendents of slaves and similarly situated people of color still battle disrespect, racial slurs, and suspicion in the marketplace.

African-American and Latino shoppers experience consumer racial profiling and racial harassment throughout the United States. Some merchants place additional burdens on consumers of color, such as, having their race recorded when making purchases with a check[10] and waiting longer for customer service. [11] Even though a federal statute exists to prohibit discriminatory treatment in consumer settings, circuits still differ on the boundaries of protection for communities of color.

This Court should grant the petitioners writ of certiorari not only to speak on this issue which affects the day-to-day lives of millions of Americans, but also to provide a consistent application of §1981 by resolving the split in the circuits.

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[10] *Roberts v. Wal-Mart Stores, Inc.*, 769 F.Supp. 1086, 1087-89 (E.D. Mo. 1991).

[11] Thomas Ainscough & Carol Motley, *Will You Help Me Please? The Effects of Race, Gender and Manner of Dress on Retail Service*, 11 Marketing Letters 129, 135 (2000).

CONCLUSION

For the foregoing reasons, as well as those stated in the Brief for the Petitioner, this Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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